REPORTS OF CASES

DECIDED BETWEEN

JANUARY 31, 1981 and MAY 15, 1981

IN THE

Supreme Court of Nebraska

JANUARY TERM 1981

VOLUME CCVIII

DONALD C. PATTON

OFFICIAL REPORTER

PRIESMAN GRAPHICS

OMAHA, NEBRASKA

1981

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By Donald C. Patton, Reporter of the Supreme Court

For the benefit of the State of Nebraska

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JUDICIAL DISTRICTS AND DISTRICT JUDGES

Number of District	Counties in District	Judges in District	City
First	Johnson, Pawnee, Nemaha, and Richardson	Robert T. Finn	Tecumseh
Second	Sarpy, Cass, and Otoe	Ronald E. Reagan	Papillion
		Raymond J. Case	Plattsmouth
		George H. Stanley	Papillion
Third	Lancaster	Samuel Van Pelt	Lincoln
		William D. Blue	Lincoln
		Dale E. Fahrnbruch	Lincoln
		Donald E. Endacott	Lincoln
		Bernard J. McGinn	Lincoln
Fourth	Douglas	Donald J. Hamilton	Omaha
		James A. Buckley	Omaha
		Theodore L. Richling	Omaha
		Samuel P. Caniglia	Omaha
		John E. Clark	Omaha
		John T. Grant	Omaha
		James M. Murphy	Omaha
		Jerry M. Gitnick	Omaha
		Paul J. Hickman	Omaha
		Keith Howard	Omaha
		D. Nick Caporale	Omaha
		Robert V. Burkhard	Omaha
Fifth	Hamilton, Polk, York, Butler, Seward, and Saunders	William H. Norton	Osceola
		Bryce Bartu	Seward
Sixth	Burt, Thurston, Dodge, and Washington	Mark J. Fuhrman	Fremont
		Darvid D. Quist	Blair
Seventh	Fillmore, Saline, Thayer, and Nuckolls	Orville L. Coady	Hebron

JUDICIAL DISTRICTS AND DISTRICT JUDGES

Eighth	Dakota, Dixon, and Cedar	Francis J. Kneifl	Dakota City
Ninth	Knox, Antelope, Cuming, Pierce, Madison, Stanton, and Wayne	Merritt C. Warren Richard P. Garden	Creighton Norfolk
Tenth	Adams, Clay, Phelps, Kearney, Harlan, Franklin, and Webster	Fredric R. Irons Bernard Sprague	Hastings Red Cloud
Eleventh	Hall and Howard	Joseph D. Martin Richard L. DeBacker	Grand Island Grand Island
Twelfth	Sherman and Buffalo	DeWayne Wolf	Kearney
Thirteenth	McPherson, Logan, Lincoln, Dawson, Keith, Arthur, Grant, Hooker, and Thomas	Hugh Stuart Keith Windrum	North Platte North Platte
Fourteenth	Chase, Hayes, Frontier, Furnas, Red Willow, Hitchcock, Perkins, Gosper, and Dundy	Jack H. Hendrix	Trenton
Fifteenth	Brown, Keya Paha, Boyd, Rock, Holt, and Cherry	Henry F. Reimer	O'Neill
Sixteenth	Sheridan, Dawes, Box Butte, and Sioux	Robert R. Moran Paul D. Empson	Alliance Chadron
Seventeenth	Scotts Bluff, Morrill, and Garden	Alfred J. Kortum Robert O. Hippe	Gering Gering
Eighteenth	Jefferson and Gage	William B. Rist	Beatrice
Nineteenth	Banner, Kimball, Cheyenne, and Deuel	John D. Knapp	Kimball
Twentieth	Blaine, Loup, Garfield, Greeley, Wheeler, Valley, and Custer	James R. Kelly	Broken Bow
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CUMULATIVE LIST OF CASES DISPOSED OF WITHOUT OPINION

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No. 43181: **Venditte v. City of Omaha.** Stipulation allowed; appeal dismissed; each party to pay own costs.

Nos. 43358, 43359: **Gross v. Gross.** Stipulation for dismissal allowed; dismissed at appellant's costs.

No. 43415: **Nelson v. Nelson.** Stipulation for dismissal of appeal allowed; appeal dismissed at costs of appellant.

No. 43445: **Dillon v. Phillips Department Stores.** Dismissed for failure to file briefs.

No. 43462: **State v. Jackson.** Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed.

No. 43476: **Ladehoff v. Wibbels.** Dismissed for failure to file briefs.

No. 43501: **Haase v. Haase.** Affirmed as modified by report and order of the court.

No. 43515: **State v. Winsley.** Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed.

No. 43530: **McMahon v. Peter Kiewit & Sons, Inc.** Stipulation for dismissal of appeal allowed; appeal dismissed; each party to pay own costs.

No. 43547: **State ex rel. NSBA v. Pettit.** Case dismissed.

No. 43550: **State v. Menser.** Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed.

No. 43576: **State v. Pettis.** Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed.

No. 43612: **State v. Blackledge.** Motion of appellee for summary affirmance sustained; judgment affirmed.

No. 43630: **State v. Smith.** Affirmed as modified; appellant given 4 days credit for jail time.

No. 43631: **State v. Stenerson.** Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed.

No. 43642: **First Nat. Bank & Trust Co. of Lincoln v. Olson.** Dismissed for failure to file briefs.

No. 43660: **State v. Levering.** Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed.

No. 43689: **State v. Minshall.** Motion of court-appointed

counsel for leave to withdraw appearance sustained; judgment affirmed.

No. 43698: **Zeller v. Cartee.** Motion of appellant for dismissal of appeal sustained; appeal dismissed at costs of appellant.

No. 43703: **Clare v. Union Pacific Railroad Co.** Motion of appellee for summary affirmance sustained; judgment affirmed.

No. 43704: **Moerer v. D & M Feed & Produce, Inc.** Motion of appellant for dismissal of appeal sustained; appeal dismissed with prejudice at costs of appellant.

No. 43710: **Carr v. Fisher.** Motion of appellee for summary affirmance sustained; judgment affirmed.

No. 43719: **State v. Barnes.** Motion of appellee for dismissal of appeal sustained; appeal dismissed as premature at costs of appellant.

No. 43723: **State v. Von Busch.** Affirmed under Rule 20.

No. 43725: **State v. Kruse.** Affirmed; see Rule 20.

No. 43747: **Grosch Irrigation Co. v. Brush & Co.** Motion of appellant for dismissal of appeal sustained; appeal dismissed at costs of appellant.

No. 43769: **State v. Burt.** Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed.

No. 43775: **State v. Palmer.** Motion of appellant for dismissal of appeal sustained; appeal dismissed at costs of appellant.

No. 43777: **State v. Warrior.** Affirmed under Rule 20.

No. 43778: **State v. Dominguez.** Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed.

No. 43799: **State v. Kittelmann.** Affirmed under Rule 20.

No. 43801: **State v. Bedford.** Dismissed for failure to file briefs.

No. 43805: **State v. Herren.** Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed.

No. 43810: **State v. Schommer.** Affirmed under Rule 20.

Nos. 43816, 43817: **State v. Coleman.** Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed.

No. 43825: **Todd v. Todd.** Motion and stipulation for dismissal of appeal allowed; appeal dismissed; each party to pay own costs.

No. 43826: **State v. Cavanaugh.** Affirmed under Rule 20.

No. 43833: **State v. Hill.** Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed.

No. 43835: **Chicago Lumber Company of Omaha v. Horner.** Motion of appellee for summary affirmance overruled.

No. 43841: **State v. Roberts.** Affirmed under Rule 20.

No. 43842: **State v. Gitchel.** Affirmed under Rule 20.

No. 43850: **State v. McCoy.** Affirmed under Rule 20.

No. 43851: **Brown v. Parratt.** Dismissed for failure to file briefs.

No. 43859: **Schumacher v. Michan.** Motion of appellant for dismissal of appeal sustained; appeal dismissed at costs of appellant.

No. 43862: **State v. Guhde.** Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed.

No. 43865: **Stricker v. Hettinger.** Joint motion for dismissal of appeal sustained; appeal dismissed at costs of appellant.

No. 43866: **Boston v. Boston.** Motion of appellant for dismissal of appeal sustained; appeal dismissed at costs of appellant.

No. 43895: **State v. Molden.** Stipulation allowed; case remanded to District Court for resentencing.

No. 43900: **Commercial Federal Savings & Loan Assn. v. Getzschman.** Motion of appellant for dismissal of appeal sustained; appeal dismissed at costs of appellant.

No. 43902: **Horwart v. Horwart.** Dismissed for failure to file briefs.

No. 43903: **State v. Amerson.** Affirmed under Rule 20.

No. 43909: **State v. Manning.** Appellant's motion for dismissal sustained; dismissed at appellant's costs.

No. 43911: **Foxley v. Foxley.** Motion and stipulation for dismissal of appeal allowed; appeal dismissed; each party to pay own costs.

No. 43913: **Pollard v. Pollard.** Stipulation for dismissal of appeal allowed; appeal dismissed at costs of appellant.

No. 43914: **Monarch Chemical Works, Inc. v. Thone.** Motion of appellants for dismissal of appeal sustained; appeal dismissed with prejudice at costs of appellants.

No. 43916: **State v. Jefferson.** Affirmed under Rule 20.

No. 43917: **State v. Washington.** Motion of court-appointed counsel for leave to withdraw appearance sustained;

judgment affirmed.

Nos. 43924, 43925: **State v. Barngrover.** Affirmed under Rule 20.

No. 43928: **Spethman** v. **State.** Appellant's motion for dismissal sustained; dismissed at appellant's costs.

No. 43929: **State v. Summers.** Motion of appellee for summary dismissal sustained; appeal dismissed.

No. 43930: **State v. Austin.** Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed.

No. 43931: **State v. Flynn.** Motion of appellant for dismissal of appeal sustained; appeal dismissed at costs of appellant.

No. 43934: **State v. Williams.** Dismissed for failure to file briefs.

No. 43937: **Oxner v. Oxner.** Affirmed as modified by report and order of the court.

No. 43947: **Scherer v. American Hail Management.** Stipulation for dismissal allowed; dismissed at appellant's costs.

No. 43952: **Anesthesia Associates v. Fleming.** Motion of appellant for dismissal of appeal sustained; appeal dismissed at costs of appellant.

No. 43953: **State v. Eggert.** Dismissed for failure to file briefs.

No. 43959: **Meckel v. Meckel.** Affirmed as modified by report and order of the court.

No. 43964: **State v. Segobia.** Motion and stipulation allowed; appeal dismissed with prejudice at costs of appellant.

No. 43968: **State v. Brye.** Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 20-A(8).

Nos. 43969, 43970: **State v. Elsinger.** Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 20-A(8).

No. 43971: **State v. Bradley.** Affirmed under Rule 20.

No. 43972: **State v. Kangas.** Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed.

No. 43974: **State v. Carmody.** Dismissed for failure to file briefs.

No. 43975: **State v. Carmody.** Dismissed for failure to file briefs.

No. 43979: **Muhe v. South Platte Nat. Resources Dist.** Motion of appellee for dismissal of appeal sustained; appeal dismissed at costs of appellant.

No. 43991: **Loewenstein v. Loewenstein.** Stipulation for dismissal of appeal allowed; appeal dismissed at costs of appellant.

No. 43995: **State v. Dahlke.** Dismissed for failure to file briefs.

No. 43996: **State v. Manning.** Motion of appellant for dismissal of appeal sustained; appeal dismissed at costs of appellant.

No. 43998: **State v. Abram.** Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed.

Nos. 43999, 44000: **State v. Smith.** Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed.

No. 44014: **Seaton v. Construction Sciences, Inc.** Motion of appellants for dismissal of appeal sustained; appeal dismissed at costs of appellants.

No. 44016: **State v. Benson.** Motion of appellant for dismissal of appeal sustained; appeal dismissed.

No. 44017: **State v. Griffin.** Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed.

No. 44031: **Morgan v. Barnes.** Motion of appellant for dismissal of appeal sustained; appeal dismissed at costs of appellant.

State v. Oliva. Application for leave to docket error proceedings denied.

No. 44036: **Ekere v. The Omaha Savings & Loan Assn.** Stipulation allowed; appeal dismissed at costs of appellant.

No. 44038: **State v. Gunter.** Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 20-A(8).

No. 44039: **State v. Elsinger.** Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 20-A(8).

No. 44052: **State v. Bernhardt.** Motion of appellee for summary dismissal sustained; appeal dismissed; see Rule 20-A(8).

No. 44072: **Stockstill v. Custodis Constr. Co.** Stipulation for dismissal of appeal allowed; appeal dismissed at costs of appellant.

No. 44081: **Aizenberg v. Montclair Nursing Center.** Motion and stipulation for dismissal allowed; appeal dismissed at costs of appellant.

No. 44082: **Rugby Hydraulics Co. v. Baum Iron Co.** Motion sustained; appeal dismissed at costs of appellant pursuant to the agreement of the parties.

No. 44088: **Erickson v. Erickson.** Motion of appellant for dismissal of appeal sustained; appeal dismissed at costs of appellant.

No. 44089: **Keller v. Swanson.** Motion of appellants for dismissal of appeal sustained; appeal dismissed at costs of appellants.

No. 44091: **First Cornhusker Corp. v. Spader.** Motion of appellant for dismissal of appeal sustained; appeal dismissed at costs of appellant.

No. 44100: **Housing Authority of the City of Omaha v. Bryant.** Motion of appellant for dismissal of appeal sustained; appeal dismissed; each party to pay own costs.

Nos. 44103, 44104, 44105, 44106: **State v. Sanders.** Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 20-A(8).

No. 44108: **Mayo's Electric Service, Inc. v. Phillips.** Stipulation for dismissal of appeal allowed; appeal dismissed at costs of appellant.

No. 44118: **Stahmer v. Terry.** Motion of appellee for summary affirmance sustained; judgment affirmed.

No. 44120: **McGowan v. McGowan.** By order of the court the decree of the District Court of February 19, 1981, is set aside and this appeal is dismissed as moot.

No. 44136: **State v. Jenkins.** Motion of appellee for summary dismissal sustained; appeal dismissed; see Rule 20-A(1).

No. 44144: **State** v. **Roesch.** Motion sustained; appeal dismissed.

No. 44177: **CBS Records, Inc. v. Records Wholesale, Inc.** Stipulation for dismissal of appeal allowed; appeal dismissed at costs of appellant.

No. 44204: **Siebrandt v. Siebrandt.** Motion sustained; appeal dismissed at costs of appellant.

Richardson v. Clark. Application for leave to commence original action denied.

GARY M. PETERSEN, APPELLANT, V.
LINDA J. PETERSEN, APPELLEE.

301 N.W.2d 592

Filed February 6, 1981. No. 42995.

Equity: Motions for New Trial: Case Overruled. An appeal from a judgment in an equitable action does not require the filing of a motion for new trial for a de novo review in this court of alleged errors in the findings and judgment of the trial court. To the extent that it conflicts herewith, *McClintock v. Nemaha Valley Schools*, 198 Neb. 477, 253 N.W.2d 304 (1977), is overruled.

Appeal from the District Court for Washington County: WALTER G. HUBER, Judge. Remanded with directions.

Steven T. Swihart for appellant.

Gregory P. Drew and Roy I. Anderson for appellee.

Heard before BOSLAUGH and WHITE, JJ., and COLWELL, RIST, and HOWARD, District Judges.

RIST, District Judge.

This is an action for dissolution of marriage in which petitioner, Gary M. Petersen, appeals from the decree of the trial court, assigning as error an abuse of discretion in the award of alimony and child support. Respondent, Linda J. Petersen, was awarded alimony in the gross amount of $100,000, payable in ten annual installments, and child support in the amount of $400 per month.

Before considering such assignments of error, we

first consider the fact that no motion for new trial was filed by petitioner in the trial court.

The rule in this jurisdiction is that actions for dissolution of marriage are considered as being in equity and on appeal are considered de novo in this court. Respondent argues, however, that such de novo review does not permit a review of the trial court's decision absent a motion for new trial and ruling thereon by the trial court. In support thereof, she cites *Sempek v. Sempek*, 198 Neb. 300, 252 N.W.2d 284 (1977); *McClintock v. Nemaha Valley Schools*, 198 Neb. 477, 253 N.W.2d 304 (1977); and *Christensen v. Eastern Nebraska Equipment Co., Inc.*, 199 Neb. 741, 261 N.W.2d 367 (1978).

Sempek was a constructive contempt proceeding where a motion for new trial was not timely filed. Such actions are treated on appeal as actions at law where, absent such motion, the appellate court will only examine the record to determine if the pleadings are sufficient to confer jurisdiction on the trial court to make the order complained of. *Wright v. Wright*, 132 Neb. 619, 272 N.W. 568 (1937). Accordingly, it is not authority for respondent's position. *Christensen* involved an appeal in a law action originating in the county court and where no motion for new trial was filed in the District Court. Again, the rule as announced in *Sempek* is applicable and does not support respondent's position here.

McClintock was an appeal to the District Court from the Nebraska Appeal Tribunal where a motion for new trial was not timely filed in the District Court. The action was treated as being equitable in nature on appeal to this court. The majority opinion held that while the judgment could be affirmed upon other grounds, it cited the well-known rule that, in equity cases, in order to review errors of law occurring during the trial, a motion for new trial must be timely filed and ruled upon. It then proceeded to hold that the trial court's judgment construing the employment

contract there involved was such a question of law and, absent such motion, such matter was not before this court. It affirmed the trial court's judgment on that basis.

The dissent in *McClintock* dealt with a definition of "errors of law occurring during the trial," and submitted that such errors generally involved rulings on the admission of evidence, matters of pleadings, and similar questions, and do not include as an alleged error that the trial court decided the case erroneously.

We believe it necessary to examine this issue again.

There is no question that in appeals in equity actions a motion for new trial is required to review rulings of the trial court on the admission or exclusion of evidence and on the amendment of pleadings. It is a rule of long standing. *Oertle v. Oertle*, 146 Neb. 746, 21 N.W.2d 447 (1946); *Nemetz v. Nemetz*, 147 Neb. 187, 22 N.W.2d 619 (1946); *Rush v. Heinisch*, 157 Neb. 545, 60 N.W.2d 608 (1953); *Faught v. Platte Valley Public Power & Irrigation Dist.*, 155 Neb. 141, 51 N.W.2d 253 (1952).

In *Lindgren v. School Dist. of Bridgeport*, 170 Neb. 279, 284, 102 N.W.2d 599, 605 (1960), this court held: "It has been the consistent holding of this court that in an equity action a motion for a new trial is required to secure a review of rulings of the trial court on alleged errors occurring at the trial, such as rulings on the rejection or reception of evidence. *It is required for no other purpose.*" (Emphasis supplied.)

It has also been consistently held that even without a motion for new trial this court on appeal can try an equity case de novo on the record and upon its merits. *Douglas County v. Barker Co.*, 125 Neb. 253, 249 N.W. 607 (1933); *Rossbach v. Bilby*, 155 Neb. 575, 52 N.W.2d 747 (1952); *Molczyk v. Molczyk*, 154 Neb. 163, 47 N.W.2d 405 (1951); *Peek v. Ayres Auto Supply*, 155 Neb. 233, 51 N.W.2d 387 (1952).

Other jurisdictions have had occasion to define the phrase "errors in law occurring at the trial." In *Miller*

v. National Benefit Ass'n., 68 S.D. 476, 4 N.W.2d 602 (1942), the Supreme Court of South Dakota held that errors in conclusions of law did not fall within the meaning of such phrase. In *Altmeyer v. Norris*, 124 Ind. App. 470, 119 N.E.2d 31 (1954), the appellate court of Indiana held that the finding of a trial court, if erroneous, is not an error occurring at the trial. The Supreme Court of Minnesota, in *Roelofs v. Baber*, 194 Minn. 166, 259 N.W. 808 (1935), held that errors occurring at the trial were those during the progress of the trial and before rendition of verdict or judgment.

Nowhere prior to *McClintock* has this court held that alleged errors in the trial court's findings or final judgment are errors of law occurring at or during the trial. We conclude from this examination that they are not such errors.

We further conclude from an examination of *McClintock* that it was not intended to change the rule with respect to the scope of review of equity cases where a motion for a new trial was not filed, but rather was intended as an application of the rule which had been in effect for many years. After careful consideration, we find that the majority opinion in that case improperly applied that rule; that alleged errors in the findings and judgment of the trial court are not errors occurring at or during trial; and that such findings and judgment in an equity action may be reviewed de novo on appeal without the filing of a motion for new trial. *McClintock* is therefore overruled to the extent that it conflicts with this determination. We therefore proceed to consider petitioner's assignments of error.

While such assignments relate only to the awards of alimony and child support, we note the decree divided the real estate of the parties, having an equity of approximately $83,000, in equal shares, each party to assume one-half of the mortgage indebtedness; divided the personal property of the parties, including automobiles, in substantially equal shares; and divided the unsecured debts of the parties in approximately

equal amounts. Petitioner was ordered to pay the secured indebtedness on the motor vehicles awarded to him; the motor vehicles awarded to respondent being free of such debt.

The parties were married in June 1958 and had three children, two of whom are emancipated. Petitioner is employed as a salesman with a net income at time of decree of $1,602 per month. Prior bonuses from his employer terminated in mid-1979, such bonuses having materially increased petitioner's earnings in prior years. There is no evidence indicating any resumption of a bonus plan or any substitute arrangement providing additional income to petitioner from his employment. Respondent at time of decree was engaged in new employment at a gross annual salary of $6,000, resulting in a net monthly income of from $400 to $460, depending upon tax exemptions. There is no evidence of any significant inheritance or gift to either party from others, nor any evidence of prior employment outside the home by respondent. Respondent was awarded custody of the minor child of the parties. Alimony and child support were awarded as set forth in the beginning of this opinion.

The allowance of alimony in the amount of $10,000 annually plus child support of $400 per month would require approximately 75 percent of petitioner's present net income. We find such allowances are beyond the reasonable reach and capacity of petitioner; and considering the division of property made by the trial court and the circumstances of the parties, such allowances are excessive to the point they represent an abuse of discretion.

We have considered the statutory criteria for allowances of alimony and child support (Neb. Rev. Stat. §§ 42-364 and 42-365 (Reissue 1978)) and prior decisions of this court relative to appropriate allowances. See *Brown v. Brown*, 199 Neb. 394, 259 N.W.2d 24 (1977). *Kosnopfl v. Kosnopfl*, 206 Neb. 524, 293 N.W.2d 854 (1980). Applying the same to the facts of this case, we find the decree herein should be modified

in the following respects: (1) Child support is fixed at $300 per month from the date of the mandate of this court herein, to continue until the minor child of the parties is emancipated or until the further order of the trial court; and (2) Respondent is awarded alimony in the amount of $4,800 per year for a period of 5 years, payable $4,800 April 1, 1981, and a like amount each April 1 thereafter, through and including April 1, 1985; said alimony to terminate upon the death of either party or remarriage of respondent. As to any unaccrued installments thereof, no installments shall bear interest to due date; but thereafter, if unpaid, such installment shall bear interest at 8 percent per annum from due date until paid.

This cause is remanded to the trial court for modification as herein provided. Respondent is awarded the sum of $300 for services of her attorney in this court.

REMANDED WITH DIRECTIONS.

PER CURIAM.

The entire court joins in the opinion rendered by the division overruling our previous holding in *McClintock v. Nemaha Valley Schools*, 198 Neb. 477, 253 N.W.2d 304 (1977).

SUSAN S. CHRISMAN, SURVIVING SPOUSE OF GERALD D. CHRISMAN, DECEASED, APPELLANT, V. GREYHOUND BUS LINES, INC., A CORPORATION, APPELLEE.

301 N.W.2d 595

Filed February 6, 1981. No. 43072.

1. **Workmen's Compensation: Words and Phrases.** The terms "injury" and "personal injuries" do not include disability or death due to natural causes but occurring while the employee is at work, nor an injury, disability, or death that is the result of a natural progression of any preexisting condition.

2. **Workmen's Compensation.** If there is some personal causal contribution in the form of a previously weakened or diseased heart, a heart attack would be compensable only if the employment contribution takes the form of an exertion greater than that of nonemployment life.
3. **Workmen's Compensation: Appeal and Error.** In an appeal to this court, the findings of fact made by the Workmen's Compensation Court shall have the same force and effect as a jury verdict in a civil case.

Appeal from the Nebraska Workmen's Compensation Court. Affirmed.

James R. Welsh and Robert V. Roach for appellant.

Theodore J. Stouffer and Ronald F. Krause of Cassem, Tierney, Adams, Gotch & Douglas for appellee.

Heard before KRIVOSHA, C.J., MCCOWN, and HASTINGS, JJ., and COLWELL and CANIGLIA, District Judges.

CANIGLIA, District Judge.

This is an action brought by the plaintiff, Susan S. Chrisman, as surviving spouse of Gerald D. Chrisman, deceased, and as the mother and natural guardian of Duane L. Chrisman, Deborah Sue Chrisman, Dale Scott Chrisman, and Dorie Ann Chrisman, minor children of Gerald D. Chrisman, deceased, seeking benefits under the Nebraska Workmen's Compensation Act from the defendant, Greyhound Bus Lines, Inc., a corporation, on account of the death of Gerald D. Chrisman, an employee of Greyhound Bus Lines, Inc.

For convenience hereafter, Susan S. Chrisman will be referred to as the plaintiff, Gerald D. Chrisman as the decedent, and Greyhound Bus Lines, Inc., as the defendant.

The plaintiff alleges that Chrisman died on April 23, 1978, as the result of an accident arising out of and in the course of his employment. The defendant, in its answer, admits that decedent was an employee, and that the cause of death was attributed to severe coronary atherosclerosis. However, the defendant denies that the cause of death arose out of decedent's

employment or from any exertion of his occupation greater than the normal exertion of his nonemployment life.

The compensation court, in a single-judge hearing, dismissed the plaintiff's petition. Pursuant to Neb. Rev. Stat. § 48-179 (Reissue 1978), the plaintiff applied for and was granted a hearing before a three-judge panel. The three-judge panel dismissed the plaintiff's petition, affirmed the findings of the single compensation judge, and affirmed his order of dismissal.

The plaintiff has appealed that ruling to this court, assigning as error that the three-judge panel of the compensation court erred in finding (1) that the evidence failed to demonstrate that the exertion of decedent's employment was greater than his nonemployment life; and (2) that the evidence failed to demonstrate that decedent's employment exertion contributed in some material and substantial degree to his fatal attack.

The issue then, presented by this appeal, is whether the evidence shows that the exertion of decedent's employment was greater than that of his nonemployment life and whether the decedent's employment exertion contributed in some material and substantial degree to his fatal attack. This determination requires a review of the evidence presented to the single judge and subsequently to the three-judge panel.

The evidence discloses the following: On April 23, 1978, the plaintiff's decedent, Gerald D. Chrisman, died of a heart attack (cardiac arrhythmia) at the Greyhound Bus Lines terminal in Omaha, Nebraska. At some time immediately prior to the attack, decedent had been in the process of unloading baggage from the baggage compartment of one of the buses in connection with his employment by the defendant. Due to the fact that the baggage compartment on a Greyhound bus is located below the space occupied by passengers, it is necessary for the employees unloading the bus to bend over at the waist or to otherwise crouch down in order to gain access to the packages contained

within the compartment. The compartments are located on both sides of the bus; usual unloading procedures dictate that two employees simultaneously work compartments on opposite sides of the bus until all luggage has been removed.

A company employee was working the baggage compartments with the decedent on the morning of his death. At some point immediately prior to the attack, the company employee had assisted the decedent in his efforts to shift a triangular-shaped package which was estimated to weigh approximately 30 to 40 pounds. While the two employees were turning the package from opposite sides of the bus, the company employee overheard the decedent utter an expletive, but did not attach significance to the expletive at the time.

Following the incident with the triangular-shaped package, the company employee proceeded to unload the two adjacent baggage compartments. Consequently, it is not known how much time elapsed between the decedent's efforts in connection with his attempt to turn the package and the onslaught of the attack; estimates range from between 3 to 5 minutes. When the company employee finally came around the bus from the rear, he found the decedent clear of the compartment and lying on the ground. Decedent was eventually transported to Lutheran Medical Center in Omaha, where he was pronounced dead.

At the time of his death, the decedent was 37 years old, 71 inches tall, and weighed approximately 220 pounds. The decedent had experienced a nagging weight problem and had been placed on various diets since 1964. He had been taking medication to control the development of hypertension since March of 1964. He had shown reluctance in following the program of medication prescribed for him and frequently complained that the drugs gave him headaches; his personal physician suspected that he rarely took the medication. In 1977, the decedent was diagnosed a diabetic, and he had been taking diabenese, one daily, since that time.

The autopsy report revealed that the decedent had contracted atherosclerosis affecting all three of the major vessels to the heart. One of the arteries had undergone a 90 percent narrowing. The report also disclosed scattered areas of scar tissue within the heart of the decedent, suggesting the existence of past coronary problems.

The decedent's nonemployment life was characterized by the plaintiff as being "physically active." In addition to his employment with defendant, he also "moonlighted" as a schoolbus driver. During the winter months he operated his own snow removal service. Although he apparently utilized a snowplow in removing large drifts in connection with his snow removal business, the decedent did assist his sons in shoveling the family's own driveway by hand. For recreation, the decedent participated in camping and enjoyed amateur mechanics as a hobby.

Based upon this evidence, the Workmen's Compensation Court made the following findings: The decedent led a moderately active nonoccupational life. He engaged in camping, playing with his children, lawn work, and snow shoveling. He worked part time as a busdriver for the city school bus system, and in the winter used his truck to plow snow in the snow removal business. His health record shows that he had a long history of high blood pressure and the autopsy demonstrates that he brought to the job the personal risk of severe coronary atherosclerosis. On the day of the fatal attack, the decedent had been on the job approximately 2 hours and had participated in loading and unloading five buses when his death occurred. The decedent had been resting approximately 5 minutes before commencing the unloading of the bus which was the one being unloaded when the decedent collapsed. The decedent had been unloading the bus for, at most, a few minutes before he collapsed, and it could be concluded that the decedent removed no more than two parcels or bags from the bus when the fatal

attack occurred. The compensation court concluded that the evidence failed to demonstrate that the employment exertion was greater than the decedent's nonemployment exertion and that said exertion contributed in some material and substantial degree to the fatal attack.

In making these findings the Workmen's Compensation Court considered the medical testimony of several experts. Summarizing the medical testimony adduced at the trial, both of the plaintiff's experts initially opined that the exertion entailed by the employment of the decedent had precipitated the fatal attack. Ultimately, however, under cross-examination, both of these experts backed away from this position, one concluding that it was not possible to say with reasonable medical certainty that decedent's exertion was greater than the physical exertion in his nonwork life; the other expert conceding that the factors precipitating the attack lay within the realm of conjecture and speculation. Only the defendant's expert maintained the same position throughout the entire proceeding; that is, the employment activity added nothing significant to the dangers inherent in the decedent's preexisting condition, and that decedent's coronary disease could have caused the fatal attack at any time during employment or nonemployment activity.

In this connection, it should be noted that the plaintiff's burden of establishing the causative link between the employment of the decedent and the fatal attack is enhanced where, as in this case, the evidence established the existence of a preexisting condition.

This court expressly recognizes the causation problems inherent in fact situations involving preexisting conditions. Neb. Rev. Stat. § 48-151(4) (Reissue 1978) provides: "The terms injury and personal injuries shall mean only violence to the physical structure of the body and such disease or infection as naturally results therefrom. The terms shall include disablement resulting from occupational disease arising out of and

in the course of the employment in which the employee was engaged and which was contracted in said employment. The terms shall include an aggravation of a preexisting occupational disease, the employer being liable only for the degree of aggravation of the preexisting occupational disease. The terms shall not be construed to include disability or death due to natural causes but occurring while the employee is at work, nor to mean an injury, disability or death that is the result of a natural progression of any preexisting condition."

The claimant must establish by a preponderance of the evidence that an unexpected or unforeseen injury was in fact caused by the employment. "The terms 'injury' and 'personal injuries' do not include disability or death due to natural causes but occurring while the employee is at work, nor an injury, disability, or death that is the result of a natural progression of any preexisting condition." *Newbanks v. Foursome Package & Bar, Inc.*, 201 Neb. 818, 822, 272 N.W.2d 372, 375 (1978). The employment must contribute substantially to cause the injury. "'If there is some personal causal contribution *in the form of a previously weakened or diseased heart*, a heart attack would be compensable only if the employment contribution takes the form of an exertion greater than that of non-employment life. Note that the comparison is not with *this employee's* usual exertion *in his employment*, but rather with the exertions present in the normal *non-employment* life of this or any other person.' [Citation omitted.]" *Beck v. State*, 184 Neb. 477, 480, 168 N.W.2d 532, 533 (1969).

In an appeal to this court, the findings of fact made by the Workmen's Compensation Court shall have the same force and effect as a jury verdict in a civil case. "A judgment, order, or award of the Nebraska Workmen's Compensation Court may be modified, reversed, or set aside only upon the grounds that (1) the court acted without or in excess of its powers, (2) the judg-

ment, order, or award was procured by fraud, (3) there is not sufficient competent evidence in the record to warrant the making of the order, judgment, or award, or (4) the findings of fact by the court do not support the order or award." See, *Scamperino v. Federal Envelope Co.*, 205 Neb. 508, 514, 288 N.W.2d 477, 481 (1980); *Johnson v. Village of Winnebago*, 197 Neb. 845, 251 N.W.2d 176 (1977).

In determining the sufficiency of evidence necessary to sustain an award of the Nebraska Workmen's Compensation Court after rehearing, such evidence must be considered most favorably to the successful party; every controverted fact must be resolved in his or her favor; and he or she must receive the benefit of every inference reasonably deducible from it. See, *McCann v. Holy Sepulchre Cemetery Assn.*, 205 Neb. 444, 288 N.W.2d 45 (1980); *Riley v. City of Lincoln*, 204 Neb. 386, 282 N.W.2d 586 (1979).

Applying these guidelines, we hold that the evidence in the record before us sustains the findings of the Workmen's Compensation Court. The order of the Workmen's Compensation Court is therefore affirmed.

AFFIRMED.

WILLIAM SIMET, PERSONAL REPRESENTATIVE OF THE ESTATE OF MICHAEL F. SIMET AND AS HEIR OF MICHAEL F. SIMET, DECEASED, APPELLANT, V. SHARON KLICH SAGE, APPELLEE.

301 N.W.2d 600

Filed February 6, 1981. No. 43272.

1. **Directed Verdict.** In determining whether a party is entitled to a directed verdict, the evidence must be considered most favorably to the other party. Every controverted fact must be resolved in his favor, and he is entitled to the benefit of every reasonable inference that may be drawn therefrom.

2. **Negligence: Pleadings: Jury Instructions.** Where negligence is pleaded and there is no competent evidence to support it, it is prejudicial error to submit such issue to the jury.

Appeal from the District Court for Douglas County: JOHN T. GRANT, Judge. Affirmed.

Frank Meares for appellant.

Richard J. Dinsmore of Dolan, Dinsmore & Davis for appellee.

Heard before BOSLAUGH, CLINTON, and BRODKEY, JJ., and REIMER and HIPPE, District Judges.

REIMER, District Judge.

The personal representative and heir of the victim of a pedestrian-automobile collision brings this action for general and special damages and damages for wrongful death in the District Court of Douglas County, Nebraska, alleging the defendant automobile operator to have been negligent (1) in failing to yield the right-of-way to plaintiff's decedent; (2) in failing to keep her vehicle under reasonable control; (3) in traveling at a rate of speed improper under the circumstances; and (4) in failing to keep a proper lookout. Defendant's answer admits the occurrence of the accident, denies negligence, and alleges contributory negligence more than slight (1) in failing to keep a proper lookout when attempting to cross a street at a point other than an intersection or crosswalk; and (2) in failing to yield the right-of-way to defendant's automobile. A trial to jury resulted in a verdict for defendant, and plaintiff appeals. We affirm.

The evidence shows that the plaintiff's decedent was a pedestrian crossing Craig Street in Omaha, Nebraska, at a point in the middle of the block west of the 28th Street intersection. Defendant was at this time proceeding west on Craig Street and had slowed to some 15 miles per hour to cross a railroad track located about half a block east of the scene of the accident. Defendant testified that as she crossed the

tracks she observed the decedent walking across the street from the south to north and gave the horn a "little toot," which the decedent did not seem to acknowledge. She further testified that as she approached the point where decedent was crossing, he had proceeded across the centerline three or four or five steps; that she turned her vehicle to the left into the left lane of the street at a speed of 5 to 10 miles per hour; and that the pedestrian stepped backward a step or two and turned into the front right-hand side of her vehicle. Officer Brock of the Omaha Police Department investigated the accident while the decedent remained in the street and before the defendant's vehicle had been moved, and he summarizes a statement made by the decedent at the scene as follows: "The pedestrian stated that he was crossing the street; he did not see the approaching auto but did hear a honk and, when he turned around to go back from where he started to cross from, he was struck by the auto." The decedent lived about a year as an invalid after the accident, and substantial damages are shown by the evidence.

On exceptions to the instructions duly raised, the plaintiff complains that the issue of defendant's negligence was submitted only on the allegation of failure to keep a proper lookout, and, further, that the issue of contributory negligence should have been directed against the defendant.

We will deal first with the question of whether the trial court erred in submitting the issue of contributory negligence to the jury. In so doing, these rules must be considered:

"[S]ince we are asked to overturn the jury verdict for defendants, we must consider this case in light of the rule that to justify this court in interfering with the findings of a jury on a fact question, the preponderance of the evidence must be so clearly and obviously contrary to the findings that it is the duty of the reviewing court to correct the mistake." *Merritt v. Reed*, 186 Neb.

561, 563-64, 185 N.W.2d 261, 263 (1971).

"'In determining whether a party is entitled to a directed verdict, the evidence must be considered most favorably to the other party. Every controverted fact must be resolved in his favor, and he is entitled to the benefit of every reasonable inference that may be drawn therefrom.'" *Koob v. Long*, 188 Neb. 640, 642, 198 N.W.2d 474, 476 (1972); *Hacker v. Perez*, 187 Neb. 485, 192 N.W.2d 166 (1971); *Napier v. Pedersen*, 175 Neb. 703, 123 N.W.2d 577 (1963).

In the instant case, as the parties neared the point of the collision, the defendant was in the position of having the right-of-way in the westbound lane of Craig Street and the plaintiff's decedent had placed upon himself a burden of considerable care in crossing Craig Street at a point other than a crosswalk. The duties of the defendant change from right-of-way as a matter of law to a duty to exercise care when she observes the position of the plaintiff's decedent from about a block away. In response to this, her testimony indicates that she slackened her speed, "tooted" the horn, and, seeing safety in doing so, pulled her automobile to the left of the centerline. A clear issue of fact remains, however, concerning the point in time at which the defendant "tooted" the horn. Defendant says it was from a block away and that the plaintiff's decedent did not respond. On the other hand, the statement of plaintiff's decedent, given to Officer Brock, indicates that he heard the horn and stepped back. Accepting, as we must for this purpose, the testimony of the defendant, she is entitled to the instruction given by the trial court on the two specific allegations of contributory negligence.

The plaintiff's second complaint of error is also covered by the foregoing analysis of the facts. "'Where . . . negligence is pleaded . . . and there is no competent evidence to support it, it is prejudicial error to submit to the jury issues [involved] . . . .'" *Oberhelman v. Blount*, 196 Neb. 42, 45, 241 N.W.2d 355, 358 (1976). No evidence of the plaintiff controverts any other fact in the

testimony of defendant other than that of when the horn was "tooted."

The verdict of the jury and judgment of the District Court is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. DENNIS SHEA, APPELLANT.

301 N.W.2d 602

Filed February 6, 1981. No. 43496.

1. **Judicial Notice: Municipal Ordinances.** This court will not take judicial notice of a municipal ordinance which does not appear in the record.
2. **Presumptions: Municipal Ordinances.** The existence of a valid ordinance creating the offense charged will be presumed where the ordinance is not properly set forth in the record.

Appeal from the District Court for Lancaster County: HERBERT A. RONIN, Judge. Affirmed.

Toney J. Redman for appellant.

Norman Langemach, Jr., City Prosecutor, for appellee.

Heard before KRIVOSHA, C.J., BOSLAUGH, MCCOWN, CLINTON, BRODKEY, WHITE, and HASTINGS, JJ.

BOSLAUGH, J.

The defendant, Dennis Shea, upon a plea of guilty, was convicted in municipal court of operating a motor vehicle while his Nebraska operator's license was suspended in violation of the municipal code of the city of Lincoln, Nebraska. He was sentenced to 30 days in jail and his driving privileges were suspended for 1 year. Upon appeal to the District Court, the judgment was affirmed.

The defendant has appealed and contends the sentence imposed was unconstitutionally excessive.

The section of the municipal code under which the defendant was sentenced, apparently § 10.52.040(c) according to the briefs, does not appear in the record. This court will not take judicial notice of an ordinance which does not appear in the record, and the existence of a valid ordinance creating the offense charged will be presumed where the ordinance is not properly set forth in the record. *State v. Long*, 206 Neb. 446, 293 N.W.2d 391 (1980).

We have examined the record and presentence report and find that the sentence imposed was not excessive.

The judgment is affirmed.

AFFIRMED.

JOHN S. OLSON ET AL., APPELLEES, V. EDITH LUELLA SAMPSON, APPELLANT.

302 N.W.2d 32

Filed February 13, 1981. No. 43007.

1. **Wills: Intent.** The provisions and conditions of a will are to be construed by the courts with a view to carrying out the intention of the testator, and the cardinal rule in construing a will is to ascertain and effectuate that intention.
2. ____: ____. The intention of the testator is to be determined from the language of all the pertinent provisions of the will and, where applicable, the circumstances under which the will was made.
3. ____: ____. In searching for the intention of the testator, the court must examine the entire will, consider each of its provisions, give words their generally accepted literal and grammatical meaning, and indulge the presumption that the testator understood the meaning of the words used.
4. ____: ____. The intention of the testator must be found within the will, and that intention is the one the testator expressed by the language of the will and not an entertained but unexpressed intention.

Appeal from the District Court for Dodge County: MARK J. FUHRMAN, Judge. Affirmed.

Neil W. Schilke of Sidner, Svoboda, Schilke, Wiseman & Thomsen for appellant.

Bernard T. Schafersman of Yost, Schafersman, Yost, Lamme & Hillis for appellees.

Heard before KRIVOSHA, C.J., BOSLAUGH, MCCOWN, BRODKEY, WHITE, and HASTINGS, JJ.

MCCOWN, J.

This is an action to quiet title and partition certain real estate. The appellant, Edith Luella Sampson, alleged that she owned a life interest in one specific tract and prayed that partition be denied as to that tract. The District Court found that appellant had no life interest in the property and entered judgment quieting title and ordering partition. The sole issue on appeal is the nature and extent of the interest Edith Luella Sampson acquired in the tract under the will of John Sampson.

John Sampson died testate on December 7, 1925, leaving eight surviving children. A handwritten will, executed by the testator's mark, left an 80-acre tract of land in specific portions of approximately 26 acres each to his daughter, Alice Amanda; his son, Victor Emanuel; and his daughter, Edith Luella, the appellant here. The testator's will then devised the 120-acre tract directly involved in this appeal to the testator's daughters, Ingrid Sardina, Anna Matilda, Emma Josina, and Esther Johanna, and his son, Nels Hjalmar, equally, share and share alike, and stated: "Provided, however, that the 120 acres herein devised cannot be sold by the owners thereof so long as any of the five children named in this paragraph are living. If any of said five children should die without issue the share of the one so dying shall descend to all of the lawful heirs of said child. Provided also, that my daughter Edith Luella shall, before her marriage, have the right to make her home with my said five children on the premises described in this paragraph."

The family residence was located on the 120-acre tract, and following the death of John Sampson it continued to be the family home. The five children, to whom the 120-acre tract was devised, and the appellant, who was and is unmarried, continued to live in the house. Esther Johanna married and left the home for some period of time but returned later and lived in the residence again with her three children until her death intestate in 1939. The other three devisee daughters never married and lived in the house until their deaths, and all died intestate. Nels Hjalmar, the last survivor of the five devisees of the 120-acre tract, died intestate in 1968. At that time the appellant was 76 years old and remained unmarried.

After the death of John Sampson, the appellant assumed the duty of directing and managing the family farm and business. Before the death of Nels Hjalmar, income from the 80-acre tract and the 120-acre tract was kept in a bank account under the names of both the appellant and Nels Hjalmar. Funds in the account, in addition to business expenses, were used to pay living expenses of family members living in the residence and, at least on occasion, for expenses of those not living there. The agricultural land on both tracts was leased. Following the death of Nels Hjalmar, the appellant continued to live in the residence and continued to lease the land, and has reported all income from both tracts on her personal income tax returns. She was living on the premises at the commencement of this action.

On October 17, 1978, the plaintiffs, who are two sons of Esther Johanna Sampson Olson, filed this action to quiet title and partition the 120-acre tract and that portion of the 80-acre tract that had been devised to Victor Emanuel Sampson, who died intestate in 1941. On August 3, 1979, the District Court found that the appellant did not have a life interest in the 120-acre tract, confirmed and quieted title in the respective owners in the percentages set out,

and ordered partition of the real estate. On this appeal no issue is raised with respect to any portion of the 80-acre tract of land, nor is there any issue as to the ownership of the fee interests in the 120-acre tract. The only issue on appeal is the nature and extent of the interest the appellant acquired in the 120-acre tract under the will of John Sampson.

The appellant originally alleged that the language of the will created a conditional life estate in the appellant, but now asserts only that the language created a conditional license or privilege to occupy and use the premises for the term of her life. She also contends that the license and privilege is not limited to the use of the residence on the land but extends to the entire 120 acres, conditioned only upon her remaining unmarried.

The provisions and conditions of a will are to be construed by the courts with a view to carrying out the intention of the testator, and the cardinal rule in construing a will is to ascertain and effectuate that intention. The intention of the testator is to be determined from the language of all the pertinent provisions of the will and, where applicable, the circumstances under which the will was made. In searching for the intention of the testator, the court must examine the entire will, consider each of its provisions, give words their generally accepted literal and grammatical meaning, and indulge the presumption that the testator understood the meaning of the words used. Where a possible construction of the words in a will leads to a highly improbable result, the court will lean toward a construction that will carry out the natural intention of the testator. See, *Rasmussen v. Wedge*, 190 Neb. 818, 212 N.W.2d 637 (1973); *Slocum v. Hevelone*, 196 Neb. 482, 243 N.W.2d 773 (1976).

The overall plan of the testator divided his property approximately equally between all of his children and was also apparently intended to provide a home for some of his children. The real property the testator owned consisted of two tracts and the residence was

on the larger 120-acre tract. The smaller 80-acre tract was devised to one of his sons, one married daughter, and the unmarried appellant, who was also designated as executrix of his will. The larger 120-acre tract involved here, upon which the residence was located, was devised to the remaining five children, share and share alike, with the limitation that the land could not be sold by the owners so long as any of the five children were living. The will also provided that if any of the five children died without issue, his or her share would descend to his or her heirs. The testator then added the provision which is critical here: "Provided also, that my daughter Edith Luella shall, before her marriage, have the right to make her home with my said five children on the premises described in this paragraph."

In determining the question of what character or quantum of estate or interest is created by a will which, by mere direction, purports to establish premises as a home for one or more designated persons, the terms of the particular instruments vary so greatly that no pattern or rule of decision can be determined. See Annot., 45 A.L.R.2d 699 (1956). The language used by the testator in the present case, that appellant should "have the right to make her home" with the five devisees of the land, would indicate that the testator intended to give the appellant only the privilege of using the home as a residence before her marriage but did not intend to create any right or interest in the land or in the income from the land.

The testator devised the entire fee title to the 120-acre tract to the five named children, with specific limitations. The first was that the land could not be sold by any of the owners so long as any of the five named children were living. He also provided that if any of the five children died without issue, his or her share would descend to all of his or her lawful heirs. The proviso for the appellant to make her home on the premises followed. All restrictions on sale or disposi-

tion of the property ended with the death of the last devisee. The appellant's privilege to occupy the residence on the premises "with" the five devisees ended at the same time. It may well be that the testator did not contemplate that the appellant would remain unmarried and would survive all the named devisees. The intention of the testator is the one expressed by the language of the will and not an entertained but unexpressed intention. See *Slocum v. Hevelone, supra.*

The finding and judgment of the District Court that the appellant did not own any life interest in the 120-acre tract was correct, and the judgment of the District Court confirming and quieting title in the respective owners and ordering partition is affirmed.

AFFIRMED.

LAURA COX, ALSO KNOWN AS LAURA HENDRICKS, APPELLEE, V.
ROBERT K. HENDRICKS, APPELLANT.

302 N.W.2d 35

Filed February 13, 1981. No. 43083.

1. **Paternity: Child Custody: Visitation.** In a paternity action where paternity has been admitted and the natural father has demonstrated a familial relationship with the child and has fulfilled parental responsibilities of support and maintenance, the fact that the child was born out of wedlock should be disregarded, and custody and visitation of minor children should be determined on the basis of the best interests of the children. In determining with which of the natural parents the children shall remain, the standards set out in Neb. Rev. Stat. § 42-364 (Reissue 1978) are to be applied.
2. **Paternity: Visitation: Jurisdiction.** The District Court in an action to establish paternity has jurisdiction to award reasonable visitation rights to the father in an appropriate case.

Appeal from the District Court for Douglas County: JOHN T. GRANT, Judge. Affirmed in part, and in part vacated and remanded.

Richard J. Schicker of Cullan, Cullan & Morrison for appellant.

Thomas F. Dowd, P.C., for appellee.

Heard before KRIVOSHA, C.J., BOSLAUGH, MCCOWN, BRODKEY, WHITE, and HASTINGS, JJ., and MORAN, District Judge.

MCCOWN, J.

This action was commenced by the mother of a child born out of wedlock to establish paternity and obtain support for the child. The father admitted paternity and sought custody of the child. The District Court found that the petitioner mother was a fit and proper person to have custody and control of such minor child, granted custody and control to her, and ordered the father to pay $140 per month for support of the child. The father has appealed.

In April 1968 the parties to this action began living together as husband and wife. At that time the woman was 18 years old and the man was 47 years old. They never married. On December 11, 1974, a daughter was born to the parties. The parties continued to live together and both shared in providing care and financial support for their daughter. In August of 1977 the mother was hospitalized under the care of a psychiatrist and remained in the hospital for approximately 3 months. Upon her release from the hospital in 1977, the mother refused to return to the family home, took custody of her daughter, and moved into an apartment. The parties have not lived together since that time.

There is evidence in the record that following the mother's departure from the family home the father harassed her at her apartment when he was intoxicated and that she called the police on several occasions. There was also evidence that the father babysat with the child on occasion with the mother's permission. In July 1978 the mother was again hospitalized. The

mother agreed to let the father take care of the daughter while the mother was in the hospital. The father took the child in July 1978 and continued to take care of her until the date of trial in October 1979. Upon the mother's release from the hospital in October 1978, she asked the father to return the child and he refused. While proceedings were pending in this case the father continued to keep the daughter at his mobile home and the mother visited the child at the father's mobile home each weekend and occasionally during the week at the home of a babysitter employed by the father.

The case was tried in the District Court on October 1, 1979. Paternity was admitted and was not at issue. The evidence at trial established that the mother had married on May 14, 1979, and that she and her husband, who was an engineering student, lived in a four-bedroom duplex. The mother was regularly employed and had a monthly gross income of $1,086. She was also a part-time student at the University of Nebraska at Omaha. The mother testified that she had secured a babysitter for the child and that she could properly provide the necessary care and attention for her daughter.

There was also evidence at the trial that the father was an alcoholic, but that he had not had a drink since April 1978, and regularly attended meetings of Alcoholics Anonymous. He was employed by Nebraska Truck Sales and Service and his gross monthly salary was approximately $900 per month. He lived in the two-bedroom mobile home in which the parties had previously resided and left the child at the home of a babysitter during his hours of employment. At the time of trial the child was not quite 5 years old.

Neither the mother nor the father had any complaint about the care which the other had given the child at any time. Both parties love their daughter and want to have physical custody of her and the child loves both parents.

On October 23, 1979, the District Court entered its decree finding that the mother was a fit and proper person to have custody and control of the minor child, granted custody and control to her, and ordered the father to pay the sum of $140 per month for support of the child. The court also found that it had no jurisdiction to award visitation rights and therefore directed that the father may visit the child at such times as the mother may determine. The case now before us is one of first impression in this jurisdiction in determining what standards are to be used in a custody dispute between the natural parents of a child born in familial circumstances but out of wedlock, whose parents have never been married to each other.

The father contends that the District Court applied the rule that the mother of a child born out of wedlock has a legal right to its custody, care, and control superior to the right of the father or any other person, and that such action was erroneous. That rule has been applied in the past in paternity cases generally, and various reasons have been assigned as the basis for the rule. See Annot., 98 A.L.R.2d 417 (1964). In the present case the decree of the District Court does not show what rule the court followed in awarding custody of the child to the mother. The decree does find that the mother is a fit and proper person to have custody and control of the child and makes no finding as to the fitness of the father.

The case at bar is not the usual paternity case in which the mother seeks to establish the paternity of her child against a putative father who has denied paternity. In this case the parties lived together as husband and wife for almost 10 years, and the father has not denied paternity but acknowledged it and accepted his paternal responsibilities. During the lifetime of the child the father continuously fulfilled the role of a father and maintained a parental and familial relationship with his child. The relationship continued even after the parties were separated, and

the father had physical custody of the child for more than a year prior to trial.

U.S. Supreme Court cases reflect the expanding concepts of the nature and extent of the rights of putative fathers. See, *Stanley v. Illinois*, 405 U.S. 645, 92 S. Ct. 1208, 31 L. Ed. 2d 551 (1972); *Quilloin v. Walcott*, 434 U.S. 246, 98 S. Ct. 549, 54 L. Ed. 2d 511 (1978); *Caban v. Mohammed*, 441 U.S. 380, 99 S. Ct. 1760, 60 L. Ed. 2d 297 (1979).

Modern cases tend to hold that where an unwed father has demonstrated a familial relationship with his child the courts do not grant a superior right of custody to the mother but decide custody issues on the basis of the best interests of the child. Kern, *Unwed Fathers: An Analytical Survey of Their Parental Rights and Obligations*, 1979 Wash. U.L.Q. 1029; Note, *The Putative Father's Paternal Rights: A Focus on "Family,"* 58 Neb. L. Rev. 610 (1979).

The clear trend in recent cases is to disregard the fact that a child was born out of wedlock in deciding custody disputes between natural parents. The case of *Pruitt v. Jones*, 62 Ohio St. 2d 237, 405 N.E.2d 276 (1980), reflects that view. In that case the natural mother of a child born out of wedlock brought a habeas corpus action against the natural father for custody of the child. The parties stipulated that they were the natural parents of the child and that they had never been married to each other. The Ohio Court of Appeals found the mother had a valid and immediate right to custody. The Ohio Supreme Court, on appeal, held that the lower court had erred in taking into account the fact that the child was born out of wedlock, and said: "We are unable to discern any difference between the present case, dealing with an illegitimate child, and a case dealing with a legitimate child. In both types of cases, when the controversy is between the child's natural parents, our main concern remains with the best interests of the child. The necessary corollary to this concern is the need for determining the suit-

ability of the parents. [Citations omitted.]" *Id.* at 238, 405 N.E.2d at 276-77. See, also, *Alberto B. v. Rosa O.*, 102 Misc. 2d 147, 423 N.Y.S.2d 111 (1979).

In a paternity action where paternity has been admitted and the natural father has demonstrated a familial relationship with the child and has fulfilled parental responsibilities of support and maintenance, the fact that the child was born out of wedlock should be disregarded, and custody and visitation of minor children should be determined on the basis of the best interests of the children. In determining with which of the natural parents the children shall remain, the standards set out in Neb. Rev. Stat. § 42-364 (Reissue 1978) are to be applied.

In the case at bar, while the court made no affirmative finding that the award of custody to the mother was in the best interests of the child, there is sufficient evidence to support such a finding and to justify the award of custody to the mother, regardless of the rule which may have been applied in reaching that result.

The District Court, however, misapplied the case of *Paltani v. Creel*, 169 Neb. 591, 100 N.W.2d 736 (1960), in determining that the court had no jurisdiction to award visitation rights in the present case. *Paltani* was decided on a demurrer on the issue of lack of jurisdiction in a statutory paternity case brought by the father. Although *Paltani* invalidated a decree which in part awarded visitation rights to a natural father, the issue of visitation rights was not directly considered nor ruled upon.

The case at bar is also a case of first impression as to the issue of visitation privileges of unwed fathers, at least in the modern era. In 1972, at the time the U.S. Supreme Court decided *Stanley v. Illinois*, *supra*, only six states granted an unwed father visitation privileges over the opposition of the mother. Today, however, virtually all states which have considered the issue have granted the father a right to reasonable visitation if it is in the best interests of the child. See,

for example, *State ex rel. Wingard v. Sill*, 223 Kan. 661, 576 P.2d 620 (1978); *Gardner v. Rothman*, 370 Mass. 79, 345 N.E.2d 370 (1976). As the Supreme Court of Kansas said in the *Wingard* case: "The day is gone when the putative father has no parental rights under the law." *Id.* at 665, 576 P.2d at 624.

In an action to establish paternity, issues of custody and visitation rights are incidental to the primary cause of action and fall within the general equity jurisdiction of the District Court. The District Court has jurisdiction to award reasonable visitation rights to the father in an appropriate case. In the case at bar the District Court did not determine visitation rights, citing lack of jurisdiction.

For the reasons stated, the decree of the District Court is affirmed in all respects except the provision that the "respondent may visit such child at such times as petitioner may determine." That portion of the decree is vacated and the cause remanded for further proceedings as to visitation rights.

AFFIRMED IN PART, AND IN PART VACATED AND REMANDED.

VIRGINIA L. KOPERSKI, APPELLANT, V. HUSKER DODGE, INC., A CORPORATION, ET AL., APPELLEES.

302 N.W.2d 655

Filed February 13, 1981. No. 43093.

1. **Uniform Commercial Code: Words and Phrases.** The Nebraska Uniform Commercial Code does not use the term "rescission," but refers to that remedy under its statutory provisions as "revocation of acceptance."
2. **Statutes: Jurisdiction.** Where a statute provides an adequate remedy at law, equity will not entertain jursidiction, and the statutory remedy must be exhausted before equity may be resorted to.
3. **Trial: Judgments: Appeal and Error.** In a trial to the court in a law action, the findings and judgment of the trial court on the facts

have the same force as a jury verdict and will not be set aside if there is sufficient competent evidence to support them, and the findings of the court will not be disturbed on appeal unless clearly wrong.

4. **Uniform Commercial Code: Revocation: Time.** Under Neb. U.C.C. § 2-608 (Reissue 1971), the buyer may revoke his acceptance of a lot or commercial unit where nonconformity substantially impairs its value to him if he has accepted it on the reasonable assumption that its nonconformity would be cured and it has not been seasonably cured. Revocation of acceptance must occur within a reasonable time after the buyer discovers or should have discovered the ground for it.
5. _____: _____: _____. Under the Uniform Commercial Code, the questions of whether goods are substantially impaired by nonconformity or whether revocation of acceptance is given within a reasonable time are questions of fact to be determined by the jury or trier of facts.
6. **Uniform Commercial Code: Words and Phrases.** Under Neb. U.C.C. § 1-201(10) (Reissue 1971), the term "conspicuous" is defined to mean a term or clause so written that a reasonable person against whom it is to operate ought to have noticed it.
7. **Uniform Commercial Code: Sales: Warranty.** Under Neb. U.C.C. § 2-316(3) (Reissue 1971), all implied warranties are excluded by expressions like "as is," "with all faults," or other language which in common understanding calls the buyer's attention to the exclusion of warranties and makes plain that there is no implied warranty.
8. **Sales: Warranty.** Where an action is based upon defendant's express representation made to the particular plaintiff in advertising or otherwise, courts generally hold that the plaintiff need not be in privity with the defendant to recover under breach of express warranty. The only limitation is that the plaintiff must be a party whom the defendant could expect to act upon the representation.
9. **Uniform Commercial Code: Sales: Warranty.** Under Neb. U.C.C. § 2-719 (Reissue 1971), a warranty agreement may provide for remedies in addition to or in substitution for those provided in this article and may limit or alter the measure of damages recoverable under this article, as by limiting the buyer's remedies to return of the goods and repayment of the price or to repair and replacement of nonconforming goods or parts.
10. **Sales: Warranty.** Language of a warranty limiting the buyer's remedies to repair and replacement of defective parts is not, on its face, unconscionable.

Appeal from the District Court for Douglas County: DONALD J. HAMILTON, Judge. Affirmed.

James A. Hogan for appellant.

Harold L. Hadland of Cassem, Tierney, Adams, Gotch & Douglas for appellee Chrysler Corp.

Hansen & Engles for appellee U.S. Nat. Bank.

James R. Sacoman of Seminara, Caniglia, Turco, McCarthy & Sacoman for appellee Husker Dodge.

Heard before BOSLAUGH, BRODKEY, and WHITE, JJ., and CASE and GARDEN, District Judges.

BRODKEY, J.

Virginia L. Koperski (Virginia), plaintiff below, appeals to this court from a decree entered by the District Court of Douglas County on October 3, 1979, dismissing her petition in an action filed by her against the defendants, Husker Dodge, Inc., Chrysler Corporation, and United States National Bank, seeking revocation of a contract entered into between her and the defendant Husker Dodge, Inc., and also for a judgment against the defendants and each of them for both direct and consequential damages suffered by her as a result of alleged defects in the automobile purchased by her. We affirm.

In her second amended petition, filed on August 7, 1979, plaintiff sets out five causes of action against the defendants Husker Dodge and Chrysler, setting forth her claims against those defendants arising out of the sale to her of a 1978 Dodge Diplomat automobile, and based on allegations of breach of warranty, rescission of contract and revocation of acceptance of the automobile, and a violation of the Consumer Product Warranties Act (Magnuson-Moss Act), 15 U.S.C. §§ 2301 et seq. The defendants each filed separate answers to the second amended petition. In its separate answer, Husker Dodge, Inc., alleged as a defense that the contract for the sale of the automobile referred to provided that it was sold "as is" by said defendant and that the contract excluded any implied warranty of merchantability, any implied warranty of fitness, and, further, denied that it had breached any warranty in connection with the sale of the vehicle. It also alleged that the plaintiff had not sustained damages as prayed

and, further, denied that plaintiff's petition stated a cause of action against them under the terms of the Magnuson-Moss Act. In its separate answer, defendant Chrysler Corporation alleged that the 1978 Dodge Diplomat automobile purchased by plaintiff was accompanied by an express limited warranty from Chrysler Corporation, under the terms of which limited warranty the exclusive obligation of Chrysler Corporation was to repair or replace any part or parts of the vehicle which proved defective in normal use, and that it had seasonably fulfilled all obligations in connection with such warranty. It also denied that the plaintiff had sustained direct and consequential damages as a result of any act or omission on the part of that defendant. Defendant U.S. National Bank was made a party to the action by virtue of a loan made by it to the plaintiff to finance the balance of the purchase price of the automobile. In its answer, the bank generally denied each of the allegations against it contained in plaintiff's second amended petition.

The case was tried in the District Court of Douglas County on August 20, 1979, and the court entered its decree in said case on October 3, 1979. In its decree the trial court found generally in favor of the defendants and against the plaintiff, and specifically found with regard to plaintiff's first cause of action based upon revocation of acceptance that the plaintiff had failed to prove by the evidence that there was a substantial impairment of value of the motor vehicle in question, and further failed to show that repairs were not seasonably performed by the defendants, but, on the contrary, that repairs were made within a reasonable length of time after notice to the defendants. The court specifically found with reference to plaintiff's second cause of action based upon an alleged breach of an express warranty by the defendant Husker Dodge that said defendant had expressly excluded all express and implied warranties under the provisions of Neb. U.C.C. § 2-316 (Reissue 1971), and that defendant

Chrysler Corporation had expressly limited its warranty to repairs and/or replacement of defective parts, and determined that under the evidence adduced the defendant had fully complied with the obligations of its limited warranty. In its decree the court specifically found with regard to plaintiff's third cause of action based upon a violation of the Magnuson-Moss Act that Husker Dodge had offered no warranty in its contract; that the manufacturer, Chrysler Corporation, had complied with the requirements of the Magnuson-Moss Act and had conspicuously designated its warranty as a limited warranty; and that therefore the Magnuson-Moss Act was not in question in the lawsuit. The court also specifically found with regard to plaintiff's fourth and fifth causes of action that the plaintiff had failed to prove any breach of warranty. The court therefore decreed that plaintiff's petition should be dismissed at plaintiff's cost. Following the overruling of a motion for a new trial, plaintiff perfected her appeal to this court.

In her brief on appeal, the plaintiff assigns as error: (1) That contrary to the finding of the court, the evidence was sufficient to establish a substantial impairment of value of the motor vehicle; (2) That the court erred in finding that the repairs were properly performed; (3) That the court erred in finding that the disclaimer of warranty on the part of Husker Dodge, Inc., was "conspicuous" and constituted an effective disclaimer of warranty; (4) That the court erred in finding that the defendants Husker Dodge, Inc., and Chrysler Corporation had not breached certain express warranties running in favor of plaintiff; (5) That the court erred in finding that defendant Chrysler Corporation had not breached its express warranties by failing to make proper repairs and/or replacement of defective parts on the automobile purchased by plaintiff; and (6) That the court erred in failing to grant plaintiff the remedy of revocation of acceptance.

The evidence in this case reveals that Virginia was a recent college graduate, and was 25 years of age at the time of the transaction in question. On June 12, 1978, Virginia entered into a purchase contract for a 1978 Dodge Diplomat with Husker Dodge, Inc., a Chrysler dealership in Omaha, Nebraska. The vehicle buyer's order recited a purchase price of $6,000. On that date, she also requested permission to take the car for a test drive, but the salesman informed her that she could only drive a demonstrator vehicle, and not the car she purchased. On June 15, 1978, she took delivery of the vehicle; and on that date various other documents were signed by the plaintiff, including a new car buyer's information sheet which listed numerous notices concerning the vehicle and applicable warranties, the car invoice, an odometer mileage statement, and the car delivery acknowledgment. Virginia made the $1,000 downpayment and arranged to finance the remaining balance through defendant U.S. National Bank.

Upon delivery of the car, Virginia noticed grease marks on the vehicle's headlining, front seat, and floorboard, and was told by the salesman that she could make an appointment to have the car cleaned. Within a few days following delivery of her automobile, Virginia began to experience difficulties with it. Testimony revealed that the car would vibrate at speeds of 35 to 40 miles per hour; that the motor killed when the air-conditioner was turned on; and that the engine would die when placed into reverse. On or about June 20, 1978, she returned the car to Husker Dodge to be cleaned and repaired.

A warranty repair order, dated June 20, 1978, indicates that the plaintiff's car was worked upon by the mechanics of defendant Husker Dodge, and that foreign material was removed from the carburetor. However, Virginia's difficulties with the Dodge did not end after this repair, and the testimony shows that she returned the car to Husker Dodge on June 22,

1978, because the engine would still die when the car was placed in reverse. At this time the plaintiff informed a service representative that she wanted the car repaired by June 30, 1978, the date of a planned family vacation to Wisconsin. Plaintiff left the vehicle to be repaired and the second warranty repair order admitted at trial indicates that the automobile's entire transmission was replaced by Husker Dodge on June 30, 1978, without charge to plaintiff. When Virginia returned for the car, she insisted on test driving it before taking it home. She testified that during the test drive the car made a high-pitched noise which emanated from the rear end, and she was told by a service mechanic that the rear end would be "going out" within 6 months. Virginia stated that when the vehicle was put into reverse gear, it again died. The record further reveals that plaintiff took the car with her on the trip to Wisconsin, having made arrangements to have the car repaired upon her return. Virginia and her parents testified that during the trip to Wisconsin the car's transmission difficulties continued, and that family members even had to push the car out of parking spaces when it failed to go into reverse. On July 5, 1978, Virginia returned from Wisconsin and took the car back to Husker Dodge for repair. The third warranty repair order admitted in evidence indicates that on that occasion the automobile's radiator was removed and a transmission cooler was replaced. Virginia returned for the car on July 8, 1978, and upon test driving the vehicle found that, while it would now go into reverse, a rubbing metallic sound was produced when the car was driven. Upon reporting these facts to the mechanic, she was instructed by him to take the car home and drive it for a week. She testified that during that period the car did not automatically shift gears when she pressed on the accelerator, but would either stop or jerk forward suddenly. Virginia's mother testified that she had occasion to drive the car during this

period, and related an incident which occurred when she crossed an intersection in Omaha. Mrs. Koperski stated that the automobile stalled in the middle of the intersection and would not move forward when she stepped on the accelerator or when she shifted gears. Finally, on restarting the car's engine, she was able to drive the car, but it would jerk forward suddenly. Mrs. Koperski expressed the opinion that the car was unsafe to drive.

It appears that during this same period Virginia secured a position in California. On July 25, 1978, she was scheduled to fly to California, and her father drove her to the airport in the Dodge. Mr. Koperski, a truck mechanic by profession, testified that on the way back from the airport he attempted to pull out onto Abbott Drive, but the car would not move. He stated that when he pressed on the accelerator nothing happened. He further stated that when he again pressed on the accelerator the car "shot" across Abbott Drive. He also stated that as he drove the vehicle it made a great deal of noise and he feared that the transmission might explode. At trial, he also expressed the opinion that the automobile was dangerous to drive.

Mr. Koperski returned the vehicle to Husker Dodge on that date and informed the service manager that his daughter wanted a replacement car. It appears that the Koperskis had previously notified their attorney as to their difficulties with the car, and on July 25, 1978, he sent a letter to defendants Husker Dodge and Chrysler Corporation requesting a replacement vehicle or, in the alternative, plaintiff would rescind the contract. He requested a return of the purchase price, as well as damages. On August 4, 1978, without the knowledge of the plaintiff, a second replacement transmission was installed in the vehicle. However, there is no question that even after installation of the second transmission, the Koperskis still did not pick up the car. Thereafter, Koperski received notice that the

car had been repossessed by the defendant bank and would be sold unless redeemed. Virginia did not redeem the automobile, and it was thereafter sold at a private sale for $5,100.

It will be helpful at the outset to determine the scope of review in this court of the action filed by the plaintiff herein, and the judgment of the trial court now here on appeal. It would appear from the record that the parties considered this action to be an action at law tried to the court without a jury, and tried the case on that theory. Neither the plaintiff nor the defendants contend to the contrary in this appeal, nor does the plaintiff on appeal contend that the action was one in equity and not one at law. Plaintiff's action was clearly brought under the statutory provisions of the Nebraska Uniform Commercial Code. While it is true that in her petition, in addition to her prayer for damages arising out of the sale of the automobile in question, plaintiff also prays for both a revocation of her acceptance of the vehicle and rescission of the contract, we conclude that the use of the term "rescission" in the petition does not automatically transform the action into an equity action. Although rescission was originally an equitable remedy, it is now clear that there are two types of rescission, one being applied to a law action and the other designated as equitable rescission. *Aron v. Mid-Continent Co.*, 141 Neb. 806, 4 N.W.2d 884 (1942); 12A C.J.S. *Cancellation of Inst.* § 4 (1980). The Uniform Commercial Code, however, does not use the term "rescission" with reference to Neb. U.C.C. § 2-608 (Reissue 1971), but refers to that remedy under its statutory provisions as "revocation of acceptance." In White & Summers, Uniform Commercial Code (2d ed. 1980), these authorities discuss the relationship between "rescission" and "revocation of acceptance" in § 8-1 at 295, as follows: "A word should be devoted to that ambiguous action called 'rescission.' Some use the word rescission to encompass what the Code defines as a rejection or

revocation of acceptance; others use it to mean simply the buyer's act in returning the goods; still others use it to cover the buyer's cancellation of the executory terms of the contract; and finally some might call it the buyer's cause of action for fraud, (including presumably the return of the goods, cancellation of the executory portion of the contract and the return of money paid). It is the apparent intention of the drafters to restrict the word rescission to a rather limited number of cases, those involving a mistake or in which the seller has committed fraud, duress, or the like. Comment 1 to § 2-608 makes the point as follows: 'The section no longer speaks of "rescission," a term capable of ambiguous application either to transfer of title to the goods or to the contract of sale and susceptible also of confusion with cancellation for cause of an executed or executory portion of the contract.' *If the seller has not committed mistake, fraud, or the like, we believe that the Code preempts the field and that the buyer's only rights to return the goods are those stated in Article Two.*" (Emphasis supplied.) More important, however, it appears to be the general rule that where a statute provides an adequate remedy at law, equity will not entertain jurisdiction, and the statutory remedy must be exhausted before equity may be resorted to. So, when jurisdiction has become concurrent through statutory enlargement of the legal remedy, a court of equity, although recognizing the existence of its jurisdiction, will generally decline to exercise it where the remedy at law is complete and adequate, and no special circumstances exist demanding the interference of equity. See 30 C.J.S. *Equity* § 23(2) (1965). Nebraska, in a long line of cases, has adopted and follows the aforesaid rule. In *Bend v. Marsh*, 145 Neb. 780, 784, 18 N.W.2d 106, 109-10 (1945), this court, citing *Brandeen v. Beale*, 117 Neb. 291, 220 N.W. 298 (1928), stated: "'"The rule obtains in this and some other jurisdictions that equity will not afford relief if the complainant has a remedy by

statutory proceeding in the original action, and that to be entitled to equitable relief against the enforcement of a judgment procured by fraud the party must not have neglected to avail himself of a statutory remedy. [Citations omitted.]"'"

Our conclusion is, therefore, that plaintiff's action, being based upon the Nebraska Uniform Commercial Code, and tried upon that theory, was an action at law tried to the court without a jury.

We therefore examine the scope of review by this court in a case tried to the court without a jury. In *Countryside Mobile Homes of Lincoln, Inc. v. Schade*, 204 Neb. 209, 281 N.W.2d 756 (1979), we stated the rule to be that in a trial to the court the findings and judgment of the trial court on the facts have the same force as a jury verdict and will not be set aside if there is sufficient competent evidence to support it, citing *Burhoop v. Pegram*, 194 Neb. 606, 234 N.W.2d 828 (1975). Also, in *Brandt v. Mayer*, 196 Neb. 751, 757, 246 N.W.2d 203, 206 (1976), we stated: "The case below was tried to the court. Our rule is well-established. Where a law action is tried to the court without a jury, the finding of the court has the effect of a jury verdict and will not be disturbed on appeal unless clearly wrong." See, also, *Siefford v. Housing Authority*, 192 Neb. 643, 223 N.W.2d 816 (1974). In *Brandt v. Mayer*, *supra* at 755, 246 N.W.2d at 205, we also stated: "It is the function of this court to independently determine if sufficient evidence was presented to sustain the trial court's finding and judgment, giving due regard to the fact the trial court had an opportunity to observe the witnesses where the testimony is in conflict."

In the instant case, the matter was tried to the court without a jury, and findings and conclusions of the trial court have already been discussed. We are governed in this case by the rules previously announced.

It is clear that the instant transaction constitutes a

sale of goods governed by article 2 of the Uniform Commercial Code.

In her first cause of action, the plaintiff seeks to revoke her acceptance of the Dodge automobile under the provisions of § 2-608, which states:

"(1) The buyer may revoke his acceptance of a lot or commercial unit whose nonconformity substantially impairs its value to him if he has accepted it.

"(a) on the reasonable assumption that its nonconformity would be cured and it has not been seasonably cured; or

"(b) without discovery of such nonconformity if his acceptance was reasonably induced either by the difficulty of discovery before acceptance or by the seller's assurances.

"(2) Revocation of acceptance must occur within a reasonable time after the buyer discovers or should have discovered the ground for it and before any substantial change in condition of the goods which is not caused by their own defects. It is not effective until the buyer notifies the seller of it.

"(3) A buyer who so revokes has the same rights and duties with regard to the goods involved as if he had rejected them."

In *Countryside Mobile Homes of Lincoln v. Schade, supra*, a case which involved the sale of a mobile home, this court held that under § 2-608 a buyer may revoke his acceptance of a lot or commercial unit whose nonconformity substantially impairs its value to him if he has accepted it on the reasonable assumption that its nonconformity would be cured and it has not been seasonably cured. In that case, however, this court held that there was sufficient evidence in the record to support the finding of the trial court that after acceptance the appellee found defects that substantially impaired the value of the mobile home, and stated: "Although neither conclusive nor the only evidence supporting diminution of value is the fact that the mobile home at public sale on January 16th brought

$7,000. This was less than one-half its value when sold to the appellee." *Id.* at 215, 281 N.W.2d at 759.

In the instant case, the court found that the plaintiff failed to prove that there was a substantial impairment of the value of the motor vehicle; and evidence in the record indicates that, upon repossession by the bank, the vehicle was sold for $5,100, or approximately 85 percent of plaintiff's original purchase price. We are not prepared to say that the trial court erred in its holding in the instant case that there was no proof of a substantial impairment of value in the motor vehicle. It appears to be the general rule that the questions of whether goods are substantially impaired by nonconformity or whether revocation of acceptance is given within a reasonable time are questions of fact subject to the jury's determination. *Conte v. Dwan Lincoln-Mercury, Inc.*, 172 Conn. 112, 374 A.2d 144 (1976). See, also, *Asciolla v. Manter Oldsmobile-Pontiac, Inc.*, 117 N.H. 85, 370 A.2d 270 (1977). Likewise, in *Peckham v. Larsen Chevrolet-Buick-Oldsmobile*, 99 Idaho 675, 679, 587 P.2d 816, 820 (1978), the court stated:

"A further factual issue appears to remain regarding the conformity of the goods. Here there appears to be a dispute as to whether the goods were accepted by Peckham in a defective nonconforming condition or whether he accepted the goods upon assurance by the seller that the defects would be remedied. As stated by I.C. § 28-2-608, comment 2:

"'[r]evocation of acceptance is possible only where the nonconformity substantially impairs the value of the goods to the buyer. For this purpose, the test is not what the seller had reason to know at the time of contracting; the question is whether the nonconformity is such as will in fact cause a substantial impairment of value to the buyer though the seller had no advance knowledge as to the buyer's particular circumstances.'

"An exhaustive discussion of what constitutes substantial impairment to a buyer is unnecessary since it

is held each case must be examined on its own merits to determine what is a substantial impairment of value to the particular buyer."

Our conclusion is that the finding of the trial court on this issue was not clearly wrong and hence will not be disturbed on appeal. *Brandt v. Mayer*, 196 Neb. 751, 246 N.W.2d 203 (1976).

We now turn to a discussion of what warranties, if any, were made by Husker Dodge, the seller of the automobile, and/or Chrysler Corporation, the manufacturer of the vehicle. With respect to Husker Dodge, it is clear from the record that it gave no separate warranty, express or implied, to the plaintiff, and in fact the evidence revealed that Husker Dodge expressly excluded all express and implied warranties on the sale of the automobile, under the provisions of § 2-316, and the court so found in its decree. There appears on the face of the vehicle buyer's order given by Husker Dodge the following disclaimer:

"AS IS

Customer note that the vehicle is being sold 'AS IS' by the Selling Dealer. Should the Manufacturer's Warranty apply to this vehicle, it is directly offered by the Manufacturer to the Customer. . . ."

In addition, the document referred to contains a disclaimer by the dealer of express or implied warranties as to merchantability or fitness of purpose. There is no question that Husker Dodge's disclaimer of warranties contained on their vehicle buyer's order was "conspicuous" as required by § 2-316(2). That term is defined in Neb. U.C.C. § 1-201(10) (Reissue 1971) as follows: "'Conspicuous': A term or clause is conspicuous when it is so written that a reasonable person against whom it is to operate ought to have noticed it. A printed heading in capitals (as, NONNEGOTIABLE BILL OF LADING) is conspicuous. Language in the body of a form is 'conspicuous' if it is in larger or other contrasting type *or color*. . . ." (Emphasis supplied.) In the instant case the disclaimer of warranties of mer-

chantability and fitness for purpose was printed in contrasting red print. The comment to the above section defining "conspicuous" states: "This is intended to indicate some of the methods of making a term attention-calling. But the test is whether attention can reasonably be expected to be called to it." There is no question that in the instant case Husker's disclaimer of warranties, printed on its document in the manner above indicated, was sufficient to call attention to such disclaimer. In addition, we note that § 2-316(3) provides in part:

"(3) Notwithstanding subsection (2)

"(a) unless the circumstances indicate otherwise, all implied warranties are excluded by expressions like 'as is', 'with all faults' or other language which in common understanding calls the buyer's attention to the exclusion of warranties and makes plain that there is no implied warranty . . . ." In this connection, see, also, *Gilliam v. Indiana Nat. Bank*, 337 So.2d 352 (Ala. Civ. App. 1976).

The evidence in the record of this case clearly indicates that the only warranty in existence was the express limited warranty furnished by the defendant Chrysler Corporation, which was included among the various documents given to plaintiff at the time of the purchase of the automobile in question.

We set forth hereafter in full the complete text of Chrysler's limited warranty:

"BASIC COVERAGE — For the first 12 months or 12,000 miles (20 000 km), whichever occurs first, any part of this vehicle supplied by Chrysler, except tires, which proves defective in normal use will be repaired or replaced by the Selling Dealer using new or remanufactured parts.

"ADJUSTMENTS — During the first 3 months of the warranty period, the Selling Dealer will also perform any adjustment service required as a result of a manufacturing deficiency. Thereafter, adjustments will be considered owner maintenance responsibility unless

required as a direct result of repair or replacement of a defective part under this warranty.

"WARRANTY START DATE — This warranty starts on the date of original retail delivery or original use, whichever occurs first.

"OBTAINING WARRANTY SERVICE — To obtain warranty or adjustment service, the owner must return this vehicle to the Selling Dealer's place of business where such service will be performed without charge for parts or labor. In the event the owner is travelling or has moved to a different locality and cannot return to the Selling Dealer, warranty and adjustment service may be obtained from any authorized Chrysler Corporation dealer who sells the same make vehicle.

"WHAT IS NOT COVERED — This warranty will not apply to:

- A vehicle on which the odometer reading is altered;
- Maintenance services as specified in the Operating Instructions & Product Information Booklet supplied with this vehicle and the parts used in connection with such services;
- Repairs required as a result of failure to properly care for or maintain this vehicle, fire, accident, abuse or negligence;
- Loss of use of the vehicle, loss of time, inconvenience, expense for gasoline, telephone, travel or lodging, loss or damage to personal property, commercial loss, loss of revenue, or other matters not specifically included are not covered.

* * * * * * * * *

"This warranty gives the owner specific legal rights and the owner may also have other rights which vary from state to state.

"THIS WARRANTY IS THE ONLY EXPRESS WARRANTY MADE BY CHRYSLER APPLICABLE TO THIS VEHICLE. ANY IMPLIED WARRANTY APPLICABLE TO THIS VEHICLE IS LIMITED IN DURATION TO THE DURATION OF THIS WRITTEN WARRANTY.

"Some states do not allow the exclusion or limitation of incidental or consequential damages or limitations on how long an implied warranty lasts, so the above limitations or exclusions may not apply to you.
"This warranty applies to the 50 United States and Canada. It applies to all owners of this vehicle during the time and mileage (kilometres) limitations expressed herein."

It is clear that under the terms of Chrysler's limited warranty, as set out above, its liability under such warranty is limited to repair or replacement of defective parts for the first 12 months or 12,000 miles, whichever occurs first. This is the only warranty involved in this litigation, as Husker Dodge had sold the vehicle to the buyer under an "as is" restriction and properly disclaimed all other warranties.

Chrysler Corporation contends, however, in its brief and argument that it is not liable under its limited warranty to the plaintiff herein because of failure of privity of contract between it and the buyer of the vehicle, pointing out that it was not the "seller" of the vehicle, but, on the contrary, that the sale of the vehicle was a transaction between Husker Dodge and the plaintiff. We point out, however, that Chrysler Corporation's warranty, although limited in scope, was a direct representation and warranty made by Chrysler to the purchaser. Chrysler's contention is effectively answered by White & Summers, Uniform Commercial Code, § 11-7 at 410-11 (2d ed. 1980), where those authorities state: "When the non-privity plaintiff's suit is not based upon 402A or implied warranty, but rather upon defendant's express representation made to the particular plaintiff in advertising or otherwise, courts generally hold that the plaintiff need not be in privity with the defendant. Usually courts characterize such cases as express warranty cases, though in some jurisdictions they are classed as misrepresentation cases. The misrepresentation may come through the defendant's advertising, through

labels attached to the product, or through brochures and literature about the product. The only limitation is that the plaintiff must be a party whom the defendant could expect to act upon the representation. Of course, any such plaintiff must also state the other elements of his cause of action.

"It is possible that lack of privity as a defense to a cause of action will be only a historic relic in the year 2000. It is a doctrine in hasty retreat; its current vitality is largely in cases in which plaintiffs seek recompense for economic loss." We point out again, however, that in this case the limited express warranty of Chrysler Corporation is not based upon merely a warranty allegedly arising in advertising materials, but is a direct written or printed warranty to the purchaser of the automobile, included with the other documents of the seller in the consummation of the sale of the vehicle. In this connection, see *Hawkins Constr. Co. v. Matthews Co., Inc.*, 190 Neb. 546, 209 N.W.2d 643 (1973).

There is no question that under the law Chrysler Corporation could legally limit its liability under its express warranty, as it did in this case. It is clear from the record that, contrary to the contentions of the plaintiff, Chrysler Corporation fully complied with the requirements of the Consumer Product Warranties Act (Magnuson-Moss Act), 15 U.S.C. §§ 2301 to 2312, inclusive. The trial court in its decree found that it had done so, and that the applicability of the Magnuson-Moss Act was not a question in this lawsuit.

"Repair and replacement" clauses, in the nature of those contained in Chrysler's limited warranty, have become the basic mechanism by which manufacturers limit or avoid liability in actions for breach of warranty. The clause provides both a remedy to the buyer, whereby he may obtain goods conforming to the contract, and a limitation of the liability of the manufacturer. See *Beal v. General Motors Corporation*, 354 F. Supp. 423 (D. Del. 1973). The authority to limit a

buyer's remedies under a warranty is found in Neb. U.C.C. § 2-719 (Reissue 1971), which provides in pertinent part as follows:

"(1) Subject to the provisions of subsections (2) and (3) of this section . . .

"(a) *the agreement may provide for remedies in addition to or in substitution for those provided in this article* and may limit or alter the measure of damages recoverable under this article, *as by limiting the buyer's remedies* to return of the goods and repayment of the price or *to repair and replacement of nonconforming goods or parts;*

. . . .

"(2) Where circumstances cause an exclusive or limited remedy to fail of its essential purpose, remedy may be had as provided in this act.

"(3) Consequential damages may be limited or excluded unless the limitation or exclusion is unconscionable." (Emphasis supplied.)

The general rule appears to be that language of a warranty limiting the buyer's remedies to repair or replacement of defective parts is not, on its face, unconscionable. *Murray v. Holiday Rambler, Inc.*, 83 Wis. 2d 406, 265 N.W.2d 513 (1978); *Ford Motor Co. v. Mayes*, 575 S.W.2d 480 (Ky. 1978); *Cox Motor Car Company v. Castle*, 402 S.W.2d 429 (Ky. 1966); *Potomac Electric Pow. Co. v. Westinghouse Elec. Corp.*, 385 F. Supp. 572 (D.C. 1974).

While it is clear that Husker Dodge, as the dealer selling the automobile in question, was not the agent of Chrysler Corporation for the sale of the automobile, it was such agent with respect to the warranty repairs under Chrysler Corporation's limited warranty. It is clear from the record that all of the repair work done by Husker Dodge on plaintiff's vehicle was authorized and paid for by Chrysler Corporation. Each dealer, by specific written agreement with the manufacturer, was authorized to perform warranty work at the expense of Chrysler Corporation. Through this agree-

ment, the manufacturer held out every dealer as its representative and agent to perform warranty work. Husker Dodge in no way adopted the manufacturer's warranty, and, in fact, sold the automobile on an "as is" basis, disclaiming any warranties whatsoever. However, with respect to the warranty work performed for Chrysler, it was clearly Chrysler's agent. It is a fundamental rule that an agent who contracts on behalf of a disclosed principal, in the absence of some other agreement to the contrary or other circumstances showing that the agent has expressly or impliedly incurred or intended to incur personal responsibility, is not liable to the other contracting party. The contract is that of the principal alone and the agent cannot be held liable thereon. See, *Bury v. Action Enterprises, Inc.*, 197 Neb. 38, 246 N.W.2d 724 (1976); *V.P.O., Inc. v. Money*, 201 Neb. 30, 266 N.W.2d 79 (1978); *Fisher v. Beebe & Runyan Furniture Co.*, 200 Neb. 349, 263 N.W.2d 826 (1978); 3 Am. Jur. 2d *Agency* § 261 (1962). In the present case, the warranty furnished by Chrysler Corporation to the buyer specifically instructed her to return the vehicle to her selling dealer's place of business or to any other authorized dealer for the performance of warranty work. Husker Dodge, which had consummated the sale, was fully responsible for all service requirements under the warranties given by Chrysler, and, by reason of its agency relationship with Chrysler Corporation, made the corporation liable as principal and seller for the warranty work performed. See, *Kure v. Chevrolet Motor Division*, 581 P.2d 603 (Wyo. 1978); *Eckstein v. Cummins*, 41 Ohio App. 2d 1, 321 N.E.2d 897 (1974). Although the record in this case indicates that the plaintiff brought her car back to Husker Dodge on various occasions during a period of approximately 6 weeks following the sale of the vehicle to her, for the purpose of repairing various defects in the automobile, the record is clear that the plaintiff was never denied repair services by

Husker Dodge, nor was she charged for same. The record reveals that Chrysler Corporation was billed for the repairs by Husker Dodge under its warranty repair agreement and, in fact, paid Husker Dodge for such repairs. There is testimony that the principal defect complained of was with regard to the transmission of the vehicle, and the transmission was, in fact, once replaced prior to the date that plaintiff's father returned the automobile to Husker Dodge. There was testimony at the trial of this matter by a representative of the service department of Husker Dodge that following the abandonment of the car by plaintiff's father on July 25, 1978, when demand was made for a new car, Husker Dodge, in fact, replaced the transmission a second time, although without knowledge on the part of the plaintiff at that time that such was being done. The service representative testified that after the installation of the second transmission, he had road tested and checked the vehicle and found that the transmission was working properly and was not defective. The Koperskis never picked up the automobile, but left it with Husker Dodge. The defendant U.S. National Bank subsequently repossessed the automobile and sold it at private sale and applied the proceeds on plaintiff's loan with the bank, as previously stated.

In its decree entered in this matter, the trial court specifically found that plaintiff had failed to prove that Chrysler Corporation had breached its warranty. We believe that under the rule regarding scope of review previously set out, there was sufficient evidence in the record to sustain this finding on the part of the trial court, and that the court was not clearly wrong.

We are aware of a line of cases which have afforded relief to the buyer of an automobile on the theory that the contract for the purchase of the automobile has failed of its essential purpose because of the fact that the warrantor has failed, neglected, or refused to make necessary and adequate repairs within a reasonable

time to place such vehicle in operating condition. In *Goddard v. G.M.C.*, 60 Ohio St. 2d 41, 396 N.E.2d 761 (1979), the court stated: "Although in most cases a limited remedy may be fair and reasonable, and satisfy the reasonable expectations of a new car purchaser, other courts and some commentators have generally recognized that when a seller is unable to fulfill its warranted obligation to effectively repair or replace defects in goods which are the subject matter of the sale, such as in the instant cause, the buyer is deprived of the benefits of the limited remedy and it therefore fails its essential purpose." *Id.* at 45, 396 N.E.2d at 764.

"In accordance with R.C. 1302.93(B), we conclude that where a new car express warranty limits a buyer's remedy to repair and replacement of defective parts, but when the new car is so riddled with defects that the limited remedy of repair and replacement fails its essential purpose, the buyer may institute an action to recover damages for breach of warranty under R.C. 1302.88(B) and, in a proper case, incidental and consequential damages under R.C. 1302.88(C) and 1302.89." *Id.* at 47, 396 N.E.2d at 765. To the same effect, see, *Clark v. International Harvester Co.*, 99 Idaho 326, 581 P.2d 784 (1978); *Durfee v. Rod Baxter Imports, Inc.*, 262 N.W.2d 349 (Minn. 1977); *Eckstein v. Cummins, supra; Ehlers v. Chrysler Motor Corp.*, 88 S.D. 612, 226 N.W.2d 157 (1975); *Kure v. Chevrolet Motor Division, supra; Murray v. Holiday Rambler, Inc.*, 83 Wis. 2d 406, 265 N.W.2d 513 (1978). However, as stated above, since we have found that the trial court was correct in its finding that plaintiff had failed to prove that Chrysler Corporation had breached its warranty, and that there was evidence in the record to support that finding, the rule enunciated in the above-cited cases cannot be applied to this case. While the result in this case might appear to be harsh, we are obligated to follow established principles of law, and we must conclude that the decree of the

trial court was correct. We affirm the action of the court in dismissing plaintiff's petition against all of the defendants herein.

AFFIRMED.

IN RE INTEREST OF BLYTHMAN. STATE OF NEBRASKA ET AL., APPELLEES, V. THEODORE W. BLYTHMAN, APPELLANT.

302 N.W.2d 666

Filed February 13, 1981. No. 43174.

1. **Mental Health: Prior Acts.** Under the Nebraska Mental Health Commitment Act, the determination of whether an act of violence is recent must be decided on the basis of all the surrounding facts and circumstances.
2. ____: ____. In order for a past act of violence to have any evidentiary value under such act, it must form some reasonable basis for a prediction of future dangerousness and be probative of that issue.
3. ____: ____. An act occurring 5 years prior to the mental health commitment hearing is recent within the meaning of Neb. Rev. Stat. § 83-1009 (Cum. Supp. 1980) where: (a) There is evidence that the act is still probative of the subject's future dangerousness; (b) The subject has not had an opportunity to commit a more recent act because he has been in confinement; and (c) There is reliable medical evidence that there is a high probability of repetition of such act by the subject.

Appeal from the District Court for Lincoln County: HUGH STUART, Judge. Affirmed.

Sean J. Brennan, Shelley K. Stall, and Scott P. Helvie, Public Defenders of Lincoln County, for appellant.

George E. Clough, Lincoln County Attorney, and Marvin L. Holscher for appellee.

Heard before KRIVOSHA, C.J., BOSLAUGH, MCCOWN, CLINTON, BRODKEY, WHITE, and HASTINGS, JJ.

HASTINGS, J.

Theodore W. Blythman has appealed from the District Court for Lincoln County, which affirmed an

order of the Board of Mental Health of Lincoln County finding Blythman to be a mentally ill dangerous person and committing him to the Lincoln Regional Center. Blythman assigns the following as errors: (1) The evidence is insufficient to support the conclusion reached by the board; (2) There is insufficient evidence of recent acts or threats of violence; (3) Constitutional guarantees of due process and equal protection are not met by proof of acts or threats of violence committed more than 5 years prior to the filing of the mental health proceeding; (4) The District Court should have reversed the order of the mental health board for procedural due process violations in ordering a predispositional evaluation; and (5) The board did not impose the least restrictive treatment alternative available. We affirm the judgment of the District Court.

Blythman was incarcerated in the Nebraska Penal and Correctional Complex after a District Court found, on April 14, 1975, that he was a sexual sociopath and that he could not be benefited by treatment. Several hearings were subsequently held pursuant to defendant's motions for annual evaluation to determine whether or not defendant remained a sexual sociopath and whether or not he could be benefited by treatment. One such review has been appealed to this court, and further background into defendant's mental illness and the prior proceedings can be found at *State v. Blythman*, 201 Neb. 285, 267 N.W.2d 525 (1978).

Pursuant to our opinion in *State v. Shaw*, 202 Neb. 766, 277 N.W.2d 106 (1979), Blythman was returned to the District Court for Lincoln County for sentencing on the original conviction of fondling a girl under the age of 16, in violation of Neb. Rev. Stat. § 28-929(2) (Reissue 1975). On May 9, 1979, the District Court sentenced the defendant to 4 years, with 4 years' credit for time served, and thereafter returned him to the penal complex as a untreatable sexual sociopath. His return to the complex for an indefinite period of time was the only option open to the court under the sexual sociopath

laws then existing, Neb. Rev. Stat. §§ 29-2901 et seq. (Reissue 1975), until he was found to be "a fit subject for discharge." § 29-2906.

On June 1, 1979, the District Court ordered that the defendant be returned to Lincoln County for further proceedings, pursuant to Neb. Rev. Stat. §§ 29-2920 and 29-2921 (Reissue 1979), a part of 1979 Neb. Laws, L.B. 378, and the Nebraska Mental Health Commitment Act, Neb. Rev. Stat. Ch. 83, art. 10 (Reissue 1976). L.B. 378, which was effective May 23, 1979, also repealed §§ 29-2901 to 29-2910 (Reissue 1975) under which statutory provisions the defendant was then being held. Section 29-2921 provides in part: "All persons now committed under Chapter 29, article 29 . . . shall forthwith be returned to the district court which committed them for review and disposition consistent with the terms of sections 29-2911 to 29-2921." Section 29-2920 requires in part: "Ninety days prior to the release from custody of any mentally-disordered sex offender . . . the . . . unit of government having final release authority shall give notice to the county attorney . . . that the release . . . is so pending. Upon receipt of such notice . . . the county attorney shall cause mental health commitment proceedings to be commenced . . . pursuant to the Nebraska Mental Health Commitment Act." As of May 23, 1979, for the first time, there was reason and authority to proceed with a civil mental health commitment against the defendant.

On June 28, 1979, a petition was filed before the Board of Mental Health of Lincoln County, alleging Blythman to be a mentally ill dangerous person and requesting involuntary commitment and board-ordered treatment. A final hearing was held on August 10, 1979, in which both the State and the defendant adduced evidence and rested. The board then ordered a predisposition investigation of Blythman by a qualified psychologist before making its final decision as to the allegations in the petition. On August 28, 1979, the mental health board reconvened and took testimony from Dr. Donald

E. Fischer of the Great Plains Mental Health Center concerning his evaluation of Blythman. Dr. Fischer diagnosed the subject as having a personality disorder of a mixed passive-dependent type and immature type; having borderline or mild mental retardation; and suffering from pedophilia. He concluded that this constituted a dangerous mentally ill person in the sense of being potentially dangerous to others by sexually, impulsively, and directly acting out in a very forceful manner as he has done in the past. The doctor further recommended treatment. The testimony of Dr. Fischer was admitted by the board over the objection of Blythman's counsel.

The board concluded that there is clear and convincing proof that Blythman is a mentally ill dangerous person and that neither voluntary hospitalization nor other treatment less restrictive of the subject's liberty than board-ordered treatment are available or would suffice to prevent the harm described in Neb. Rev. Stat. § 83-1009 (Cum. Supp. 1980). The board ordered that Blythman be committed to the Lincoln Regional Center and there remain until transferred or discharged, as provided by law.

An appeal from the order of the board was taken to the District Court for Lincoln County and was affirmed. Blythman appeals now from the order of the District Court, which we affirm.

The first three assignments of error are related and will be considered together, i.e., that the evidence is insufficient to support the conclusion of the board; that there is insufficient evidence of recent acts or threats of violence; and that constitutional guarantees of equal protection and due process are not met by proof of acts committed more than 5 years prior to the filing of the mental health proceeding. Neb. Rev. Stat. § 83-1037 (Cum. Supp. 1980) requires a conclusion based on clear and convincing proof that the subject is a mentally ill dangerous person and that less restrictive alternatives are not available or would not suffice to

prevent the harm described in § 83-1009. The latter section states in pertinent part: "Mentally ill dangerous person shall mean any mentally ill person or alcoholic person who presents: (1) A substantial risk of serious harm to another person or persons within the near future, as manifested by evidence of *recent violent acts* or threats of violence or by placing others in reasonable fear of such harm . . . ." (Emphasis supplied.) The appellant asserts that proof of acts which occurred prior to his incarceration in the Penal Complex and more than 5 years previous to the filing of the mental health commitment proceeding are not "recent acts" within the meaning of § 83-1009.

In order for a subject to be civilly committed pursuant to the Nebraska Mental Health Commitment Act, there must be both a finding that the subject is mentally ill as well as a finding that he is dangerous, either to himself or to others. § 83-1009. *Benson v. Meredith*, 455 F. Supp. 662 (D.C. 1978). Mr. Blythman concedes that he suffers from some mental illness; however, he challenges the finding that he is dangerous. For there to be compliance with the fourteenth amendment's due process clause, there must be an independent finding of dangerousness. *Jackson v. Indiana*, 406 U.S. 715, 92 S. Ct. 1845, 32 L. Ed. 2d 435 (1972). By the same token, "[a] finding of 'mental illness' alone cannot justify a State's locking a person up against his will and keeping him indefinitely in simple custodial confinement." *O'Connor v. Donaldson*, 422 U.S. 563, 575, 95 S. Ct. 2486, 45 L. Ed. 2d 396 (1975). Section 83-1009 requires that such dangerousness must be evidenced by some recent act or threat.

There is little doubt that the Nebraska Mental Health Commitment Act was passed in response to a number of federal cases defining constitutional safeguards for the commitment of the mentally ill. The act was enacted after the U.S. District Court for the District of Nebraska declared Neb. Rev. Stat. §§ 83-325 and 83-328 (Reissue 1971), and § 83-306(4) (Cum. Supp.

1974), to be unconstitutional in *Doremus v. Farrell*, 407 F. Supp. 509 (D. Neb. 1975). The Federal District Court stated: "To permit involuntary commitment upon a finding of 'mental illness' and the need for treatment alone would be tantamount to condoning the State's commitment of persons deemed socially undesirable for the purpose of indoctrination or conforming the individual's beliefs to the beliefs of the State. Due process and equal protection require that the standards for commitment must be (a) that the person is mentally ill and poses a serious threat of substantial harm to himself or to others; and (b) that this threat of harm has been evidenced by a recent overt act or threat." *Doremus* at 514-15.

The requirement that there must be a recent overt act or threat stems from the necessity of defining mental illness requiring confinement as where the person's potential for doing harm to himself or to others is great enough to justify a massive curtailment of his liberty. See *Humphrey v. Cady*, 405 U.S. 504, 92 S. Ct. 1048, 31 L. Ed. 2d 394 (1972). The prediction of dangerousness is a difficult and often elusive task. Hagel, *Defending the Mentally Ill: A Discussion of Nebraska's Involuntary Commitment Proceedings*, 57 Neb. L. Rev. 1 (1978).

"Although attempts to predict future conduct are always difficult, and confinement based upon such a prediction must always be viewed with suspicion, we believe civil confinement can be justified in some cases if the proper burden of proof is satisfied and dangerousness is based upon a finding of a recent overt act, attempt or threat to do substantial harm to oneself or another." *Lessard v. Schmidt*, 349 F. Supp. 1078, 1093 (E.D. Wis. 1972).

The key to confinement of one who is mentally ill lies in the finding that he is dangerous, i.e., that absent confinement, he is likely to engage in particular acts which will result in substantial harm to himself or others. Indefinite preventive detention cannot be

authorized for those "who have a propensity to behave in a way that is merely offensive or obnoxious to others; the threatened harm must be substantial." *Cross v. Harris*, 418 F.2d 1095, 1100 (D.C. Cir. 1969). That court further stated: "But when a determination of 'dangerousness' will result in a deprivation of liberty, no court can afford to ignore the very real constitutional problems surrounding incarceration predicated only upon a supposed propensity to commit criminal acts .... Incarceration for a mere propensity is punishment not for acts, but for status, and punishment for status is hardly favored in our society. In essence, detention for status is preventive detention.

. . . .

"[T]he test of what anticipated conduct may justify preventive detention cannot be simply whether the legislature has power to prohibit such conduct or to attack the evil it portends. . . . But while it [the legislature] may prohibit ugly billboards because they give offense, it may not lock up ugly people for the same reason. The power to control an evil does not remove all restrictions on the means that may be employed for that purpose. This principle is fundamental to the constitutional order." *Cross* at 1101-03.

To comply with due process, there must be a finding that there is a substantial likelihood that dangerous behavior will be engaged in unless restraints are applied. "While the actual assessment of the likelihood of danger calls for an exercise of medical judgment, the sufficiency of the evidence to support such a determination is fundamentally a legal question. . . . To confine a citizen against his will because he is likely to be dangerous in the future, it must be shown that he has actually been dangerous in the recent past and that such danger was manifested by an overt act, attempt or threat to do substantial harm to himself or to another." *Lynch v. Baxley*, 386 F. Supp. 378, 391 (M.D. Ala. 1974).

In determining whether a person is dangerous, the focus must be on the subject's condition at the time

of the hearing. Actions and statements of a person alleged to be mentally ill and dangerous which occur prior to the hearing are probative of the subject's present mental condition. "But a mere recitation of past acts, in the absence of a showing that such clearly forms the foundation for a prediction of future dangerousness, cannot serve as the basis for a finding that one is a mentally ill person pursuant to ORS 426.005(2)." *State v. Lucas*, 31 Or. App. 947, 950, 571 P.2d 1275, 1277 (1977).

In order for a past act to have any evidentiary value it must form some foundation for a prediction of future dangerousness and be therefore probative of that issue. Blythman argues that proof of acts committed 5 years prior to the hearing are not "recent acts" within the meaning of § 83-1009. In *Hill v. County Board of Mental Health*, 203 Neb. 610, 279 N.W.2d 838 (1979), we stated that there is no way to establish a definite time-oriented period to determine whether an act is recent. Each case must be decided on the basis of the surrounding facts and circumstances.

In *Hill* we held: "The term recent should be given a reasonable construction. We hold that an act or threat is 'recent' within the meaning of section 83-1009, R. S. Supp., 1978, if the time interval between it and the hearing of the mental health board is not greater than that which would indicate processing of the complaint was carried on with reasonable diligence under the circumstances existing, having due regard for the rights and welfare of the alleged mentally ill dangerous person and the protection of society in general." *Hill* at 617, 279 N.W.2d at 841.

In the case at bar, Blythman was committed as a sexual sociopath in 1975; was returned to the District Court on May 9, 1979, for sentencing on the original conviction; and on June 1, 1979, was returned for further proceedings pursuant to the Nebraska Mental Health Commitment Act. Considering the changes in the law during these proceedings, the complaint was carried

on with reasonable diligence. Blythman argues that *Hill* should not be applied here because such an interpretation of "recent" would permit involuntary civil commitment regardless of how remote in time the acts or threats of violence are. The argument is well taken. However, such a result does not necessarily follow if it is kept in mind that any act that is used as evidence of dangerousness must be sufficiently probative to predict future behavior and the subject's present state of dangerousness. It is conceivable that an act more recent than another would be less probative of the subject's future conduct than the earlier act. Considering all of the factors, we cannot say that as a matter of law an act which occurred 5 years ago is too remote to be probative of the subject's present state of dangerousness. This is particularly true since the subject did not have an opportunity to commit a more recent act in the intervening years.

The fact situation in this case is somewhat unique in that the subject's mental illness manifests itself in sexual acts toward young girls. He has not had the opportunity to commit such an act in the past 5 years because he has been incarcerated in the Penal Complex, where he has had no access to prospective victims. We cannot believe that the Legislature intended that by requiring a recent act or threat, a mentally ill person should be given the opportunity to commit a more recent act once a sufficient amount of time has passed since the last act. Judicial action need not be forestalled until another young girl is sexually assaulted, or some other harm takes place. *In re Powell*, 85 Ill. App. 3d 877, 407 N.E.2d 658 (1980); *In re Janovitz*, 82 Ill. App. 3d 916, 403 N.E.2d 583 (1980).

A similar argument was advanced in *Kraemer v. Mental Health Board of the State of Nebraska*, 199 Neb. 784, 261 N.W.2d 626 (1978). There, we stated that an incident occurring in May 1975 was sufficiently recent to conform to the meaning of the statute. "Any other view would require, as to those already committed when

the enforcement of the former act was enjoined and who were entitled to a new hearing under section 83-1072, R. R. S. 1943, the discontinuance of treatment and release in order to afford an opportunity for a more recent act of violence before any rehearing and further confinement could take place. Such would be contrary to the evident and expressed purposes of section 83-1072, R. R. S. 1943, when read in conjunction with the entire act." *Kraemer* at 799, 261 N.W.2d at 634.

In the present case, the testimony indicated that there was a very high probability that Blythman would repeat the behavior for which he was originally determined to be a sexual sociopath. Expert testimony by Dr. L. E. Woytassek, a psychiatrist, was that, based on a reasonable medical certainty, he believed Blythman to be mentally ill as well as dangerous. This testimony was based on the expert's knowledge of Blythman since 1965. Dr. Woytassek testified that Blythman had a history of sexual deviation with reference to children, and that "there was a very high probability he would repeat." There was testimony by Dr. Fischer, the board-ordered expert, which reinforced the prior testimony. Blythman was diagnosed as suffering from pedophilia, which is the diagnostic term for the crime of molesting minors. Dr. Fischer testified that to a reasonable medical certainty, if Blythman did not obtain treatment, the sexual incidents which happened before would happen again. This testimony was based both on the incidents which occurred prior to confinement in the Penal Complex as well as a recent examination, showing that there had been no demonstration by Blythman of real growth in the awareness of his needs and how he will meet those needs and control his impulsiveness.

There was no evidence presented by Blythman to rebut the testimony of either psychiatrist. Neither was there any evidence that the acts which occurred 5 years previous to the hearing were too remote to be probative of Blythman's present state of dangerousness and prob-

able future conduct. Blythman did not present any evidence that he had learned to cope with his immaturity and impulsiveness, or that he had been "cured" of his pedophilia.

We therefore hold that there is sufficient evidence to support the conclusion reached by the board that Blythman is a mentally ill dangerous person. We further hold that proof of acts committed more than 5 years prior to the filing of the mental health proceedings does not contravene Blythman's due process and equal protection guarantees where there is sufficient evidence that such acts are still probative of the subject's present state of dangerousness.

The fourth assignment of error refers to the testimony by Dr. Fischer. Blythman argues that the board had no authority to order further testimony by an independent psychiatrist prior to making a finding that the subject is mentally ill and dangerous. He relies on Neb. Rev. Stat. § 83-1040 (Reissue 1976) which authorizes the board to request a predisposition investigation to be conducted to determine the best available treatment alternative. Inherent in that authorization is the requirement that the board must first make the determination that the subject is mentally ill and dangerous. The board in this case did not make that finding prior to ordering an independent evaluation of Blythman. We have reviewed the record de novo, as we are required to do. *Hill v. County Board of Mental Health, supra.* We find that there was sufficient evidence before the board that it could have found Blythman to be mentally ill and dangerous before ordering the predisposition investigation. The evidence by the State's psychiatrist, Dr. Woytassek, was unrebutted, that Blythman is mentally ill and dangerous, having a history of sexual deviation with reference to children, and that there was a very high probability that he would repeat.

The board further asked for recommendations from counsel for both parties as to where a predisposition

evaluation should be made. Counsel for the subject made his recommendations at that time, and did not object to the predisposition evaluation. It was not until after the evaluation was made and the psychiatrists had been called before the board to testify that Blythman's counsel objected to the testimony of Dr. Fischer. The objection was overruled and testimony was taken by the board. Attorneys for Blythman were given the opportunity to extensively cross-examine Dr. Fischer, and did so.

Neb. Rev. Stat. § 83-1059 (Reissue 1976) makes the general rules of evidence, Neb. Rev. Stat. Ch. 27 (Reissue 1979), applicable to proceedings under the Nebraska Mental Health Commitment Act. *Kraemer v. Mental Health Board of the State of Nebraska, supra.* Section 27-614 authorizes a judge, on his own motion, to call witnesses, in which event all parties are entitled to cross-examine such witnesses. Section 27-706 permits a judge to enter an order to show cause why expert witnesses should not be appointed.

Although the board may have been in error in failing to first make the determination that Blythman was mentally ill and dangerous, the subject was not prejudiced. As we have previously stated, the board could have made the necessary findings prior to ordering the predisposition evaluation. The board gave counsel the opportunity to recommend the facility to conduct the evaluation, and further allowed extensive cross-examination of the psychiatrist. Based on the foregoing, we find that Blythman's rights to a fair and impartial board were safeguarded and there was no deprivation of his rights to due process. Any error on the part of the board was, in this instance, harmless and is not cause for reversal.

The final assignment of error is that the board did not impose the least restrictive treatment alternative that was available. Neb. Rev. Stat. § 83-1038 (Cum. Supp. 1980) requires: "The disposition ordered by the mental health board shall represent the alternative which

imposes the least restraint upon the liberty of the subject required to successfully treat the particular mental illness and prevent the particular harm which was the basis for the board's finding the person to be a mentally ill dangerous person. . . ." Blythman argues that he should have been allowed to follow an outpatient treatment on a voluntary commitment basis. The testimony by Dr. Fischer, in response to a question regarding the possibility of treatment on an intensive outpatient basis, was: "The supervision would have to be spelled out so articulately, provisions so iron-clad, if you will, that I can't really envision them. And I think that the patient would feel he was hounded. It may well be that it could follow in-patient care."

The statement by the chairman of the mental health board at the time of commitment explained that the reason Blythman was committed to the Lincoln Regional Center was that it was the only state facility with adequate security features. After reviewing the evidence and testimony, we agree that such a secured facility is necessary to successfully treat this particular mental illness and prevent the harm which the subject is likely to repeat in a less secure environment.

The evidence is clear and convincing that Theodore W. Blythman is a mentally ill and dangerous person, and the order of the District Court is affirmed.

AFFIRMED.

LAKESHORE COMMERCIAL FINANCE CORPORATION, APPELLEE, V.
NORTH PLATTE H. J. MOTEL, INC., A CORPORATION, ET AL., APPELLANTS.

302 N.W.2d 39

Filed February 13, 1981. No. 43339.

Mortgages: Parties. The interest of a party claiming under the mortgagor but prior to the mortgage may be determined in an action to foreclose the mortgage.

Appeal from the District Court for Lincoln County: KEITH WINDRUM, Judge. Affirmed.

Jerome Rinzel of Rinzel and Panlick, S.C., and Robert E. Roeder for appellants.

Robert K. Steuer of Weiss, Steuer, Berzowski & Kriger and Richard W. Satterfield of Kay & Satterfield for appellee.

Heard before BOSLAUGH and WHITE, JJ., and KELLY and BARTU, District Judges, and RONIN, Retired District Judge.

BOSLAUGH, J.

This was an action to foreclose mortgages upon the property in Lincoln County, Nebraska, upon which the North Platte Howard Johnson Motel and Restaurant is located. The motel and restaurant are owned by the defendant, North Platte H. J. Motel, Inc. The other principal defendant is Virginia K. Lesperance.

In 1971, the plaintiff, a commercial finance corporation, loaned funds to the defendant motel corporation pursuant to a promissory note dated March 1, 1971, in the amount of $150,000, secured by two mortgages upon the property, also dated March 1, 1971. One of these mortgages was recorded on March 18, 1971. The plaintiff made additional loans to the motel corporation in 1971, 1972, and 1973. The construction of the motel and restaurant commenced in September 1971 and was completed in September 1972. Permanent financing for the project was obtained from The Lincoln National Life Insurance Company. A release of the plaintiff's mortgage dated June 18, 1971, was recorded on January 29, 1973, so that the insurance company mortgage would be the first mortgage.

On March 27, 1975, a deed purporting to convey the property to Virginia K. Lesperance was recorded. This deed, which was dated September 6, 1971, was purportedly executed on behalf of the corporation by "V. Lesperance" as the president.

On September 3, 1974, the plaintiff recorded the other mortgage dated March 1, 1971. On January 13, 1976, the plaintiff obtained a further mortgage from the motel corporation, which was recorded on January 23, 1976.

The trial court found that the deed to Virginia K. Lesperance was void, and the failure to record it for an extended period of time was either a fraud or an estoppel; that the plaintiff's mortgage dated January 15, 1976, was valid and subject only to the insurance company mortgage and the leasehold interest of the Howard Johnson Company; that the sum of $301,196.37 was due the plaintiff from the motel corporation; and that the plaintiff was entitled to foreclosure. The defendants have appealed.

The controlling issue on the appeal is the validity of the deed to Mrs. Lesperance.

The evidence shows that in all of the transactions between the plaintiff and the corporation, Joseph W. Restle represented the motel corporation. Mrs. Lesperance testified, by deposition, that she had never been an officer of the motel corporation and that Restle and his wife were the officers of the corporation. Mrs. Lesperance was a secretary in the Milwaukee County department of welfare. She was unfamiliar with the property, had never seen it, did not know whether it was mortgaged, and could not "recall" what she had paid for the property. The inference from the evidence as a whole is that there was no consideration for the deed to her. It is clear from the evidence that the deed to Virginia K. Lesperance was void as against the plaintiff and that the decision of the trial court on this issue was correct.

The defendants argue that the validity of the Lesperance deed could not be litigated in the foreclosure action under the rules stated in *Lincoln Joint Stock Land Bank v. Barnes*, 143 Neb. 58, 8 N.W.2d 545 (1943). In that case, authority is quoted to the effect that the validity of a title paramount and adverse to the

mortgagor *and not derived from him* cannot be litigated in a proceeding to foreclose a mortgage. The rule, even if valid, has no application here. See 59 C.J.S. *Mortgages* § 627 (1949).

It is unnecessary to consider the other assignments of error. The judgment of the District Court is affirmed.

AFFIRMED.

MANUEL G. AGUALLO, APPELLANT, V. WESTERN POTATO, INC., A CORPORATION, ET AL., APPELLEES.

302 N.W.2d 41

Filed February 13, 1981. No. 43478.

1. **Workmen's Compensation: Proof.** The burden of proof is upon the plaintiff to show by a preponderance of the evidence that the disability sustained was caused by or related to the accident and was not the result of the normal progression of plaintiff's preexisting condition.
2. **Workmen's Compensation: Appeal and Error.** Findings of fact made by the compensation court after rehearing have the effect of a jury verdict and may not be set aside unless clearly wrong.

Appeal from the Nebraska Workmen's Compensation Court. Affirmed.

Jim Zimmerman of Atkins, Ferguson, Hahn, Zimmerman & Carney for appellant.

Wright & Simmons for appellees.

Heard before KRIVOSHA, C.J., WHITE, and HASTINGS, JJ., and HENDRIX and KNAPP, District Judges.

KNAPP, District Judge.

This is an appeal in a proceeding under the Workmen's Compensation Act. The plaintiff, Manuel G. Aguallo, was employed as a laborer by the defendant Western Potato, Inc., a corporation. The plaintiff

alleged that on March 26, 1976, while at work unloading potatoes, his left knee was injured when pinned against a wall by a conveyor, tearing the medial meniscus, and that on February 25, 1978, while at work sewing potato sacks, his left knee was again injured when three full sacks of potatoes "leaned against" the knee, causing a severe strain thereto. Plaintiff further alleged that the injuries to his left knee caused him to limp, thus placing an inordinate burden upon his right leg and accelerating the progress of an existing arthritic condition in both knees, ultimately resulting in plaintiff becoming permanently disabled.

At a hearing before a single judge of the compensation court, the plaintiff recovered an award for temporary total disability, for a 50 percent permanent partial loss of use of the left leg, for hospital and medical expenses, for attorney fees, and for an additional assessment of 50 percent of all payments found delinquent for more than 30 days. Defendants were given credit for $1,494.65 medical and hospital expenses and for $3,800 temporary total disability compensation paid prior to trial. The judge found that the alleged second injury was not the result of an accident but was merely a manifestation of the injuries resulting from the accident of March 26, 1976.

Both plaintiff and defendants filed refusals to accept the findings and award of the single judge. Upon rehearing before a three-judge panel of the compensation court, the award was reversed and plaintiff's petition dismissed, the panel finding that plaintiff had failed to sustain his burden of proving that the permanent disability of which he complained was the result of a compensable accident, in that the testimony of plaintiff's physician failed to causally connect that disability with either of the alleged accidents, and that plaintiff offered no other medical evidence to supply the necessary causation. Plaintiff appeals. We affirm.

The evidence shows that, following the accident of March 26, 1976, plaintiff was X-rayed at the Slagle

Clinic and a cast was applied to the left knee on June 3, 1976, and removed on June 17, 1976. He next visited the clinic on October 20, 1976, when he was referred to Dr. Paul Phillips, whose deposition was introduced at the trial. In February of 1977, a Dr. Jardon surgically repaired a torn medial meniscus in plaintiff's left knee. Dr. Jardon did not testify. The sole medical testimony was that of Dr. Phillips, who stated, in essence, that arthritis was present in plaintiff's knees prior to March 26, 1976; that he did not know how much or whether the trauma of March 26, 1976, had affected plaintiff's arthritic condition; that this was a question no one could really answer; that he had no opinion as to whether plaintiff's right leg was adversely affected by the limp caused by the injuries to the left knee; that any opinion would be speculation; that while it is conceivable that the right leg was so affected he could not state with any certainty that it was in fact so affected; and that plaintiff's arthritic condition would naturally progress to that point anyway.

The burden of proof is upon the plaintiff to show by a preponderance of the evidence that the disability sustained was caused by or related to the accident and was not the result of the normal progression of plaintiff's preexisting condition. *White v. Western Commodities, Inc.*, 207 Neb. 75, 295 N.W.2d 704 (1980). The issue on appeal, whether or not a causal connection was established between the disability and the accident, is an issue of fact. Findings of fact made by the compensation court after rehearing have the effect of a jury verdict and will not be set aside unless clearly wrong. Neb. Rev. Stat. § 48-185 (Reissue 1978).

The compensation court's finding complained of cannot be said to be clearly wrong.

AFFIRMED.

STATE OF NEBRASKA EX REL. CHARLES E. SCHULER, APPELLANT, V. FLOYD DUNBAR ET AL., APPELLEES.

302 N.W.2d 674

Filed February 20, 1981. No. 42976.

1. **Political Subdivisions: Public Meetings.** The provisions of a statute requiring the spreading upon the record of the governing body the vote on an action taken are intended to require an indisputable record of the action actually taken, so that the public might have an opportunity to know how the elected officials voted thereon.
2. ____:____. A governing body may, under some circumstances, correct its own record, nunc pro tunc, to show the adoption of a motion, resolution, or ordinance, and to record the truth of how it was voted upon. It may not, however, by such action show that the separate requirement that these actions be spread upon the record of the minutes of the governing body was performed prior to the time that the spreading upon the minutes actually took place.
3. ____:____. The provisions of Neb. Rev. Stat. § 84-1413(2) (Reissue 1976), providing: "The record shall state how each member voted, or if the member was absent or not voting," cannot be satisfied by a nunc pro tunc amendment showing the recording of the vote in the minutes was performed prior to the time the actual recording in the minutes took place.
4. **Witnesses: Constitutional Law.** Where a defendant in a civil case refuses to testify on the ground that the evidence may incriminate him, the trier of fact may draw an adverse inference from his refusal.

Appeal from the District Court for Loup County: JAMES R. KELLY, Judge. Remanded with directions.

George Rhodes for appellant.

Joseph M. Casson for appellees.

Heard before KRIVOSHA, C.J., BOSLAUGH, MCCOWN, CLINTON, BRODKEY, WHITE, and HASTINGS, JJ.

CLINTON, J.

The relator, a citizen and taxpayer of Loup County, Nebraska, brought this action in the District Court for Loup County, Nebraska, under the provisions of Neb. Rev. Stat. § 84-1414(3) (Reissue 1976), against Floyd Dunbar, Robert Schrup, and Glen Pollard, the persons who constitute the board of county commis-

sioners of Loup County, Nebraska, to have declared void an act of the commissioners taken on January 3, 1978, setting salaries of various county officials for the year 1979. The basis for the claim of nullity is Neb. Rev. Stat. § 84-1413(2) (Reissue 1976), which provides: "Any action taken on any question or motion duly moved and seconded shall be by roll call vote of the public body in open session, and the record shall state how each member voted, or if the member was absent or not voting."

The relator introduced certain documentary evidence and called the defendant Dunbar as his witness. The defendants called the relator as their witness in an apparent effort to establish estoppel as a defense. That defense is not urged in this court.

The trial judge found that "the Defendants did take a roll call vote on their action regarding the setting of salaries for Loup County officers and same was recorded in the minutes of Defendants' January 3, 1978 meeting." The determinative issue before us on this appeal is whether the evidence supports the above finding.

The action attacked, as described in the minutes, was as follows: "The Board set the following Salaries for County Officials for the term beginning January 1979 and the amount in parenthesis represents the present salaries:

"Treasurer	6700.00	(6000.00)
"Service Officer	600.00	(600.00)
"County Clerk	9000.00	(8000.00)
"Sheriff	7850.00	(6850.00)
"Attorney	6700.00	(6000.00)
"Commissioners	3000.00	(2400.00)"

Nothing in the original minutes of the January 3, 1978, meeting indicates that a motion was made and seconded, that there was a rollcall vote, or that votes were recorded in any manner. The introductory portion of those minutes states that the members of the board, the three defendants in this action, were present.

Other documentary evidence, offered by the relator and received without objection, shows that at the meeting of January 10, 1978, "Minutes of the January 3, 1978 meeting were read and approved." Additional documentary evidence, also received without objection, indicates that at a meeting of the board of commissioners on January 15, 1979, after this action had been commenced, the following action was taken: "Motion made by Pollard, seconded by Schrup the [sic] the minutes of the January 3, 1978 meeting of the Loup County Commissioners be corrected to reflect the vote of the Board on the action taken in setting the salaries of the county officials for the terms of office beginning January 4, 1979, said vote being yes, unanimous." The above-quoted words were apparently then typed at the bottom of the minutes of the January 3, 1978, meeting, under the apparently previously affixed signature of the county clerk. On the margin opposite the quoted words appeared, in script, the underscored words: "As corrected January 15, 1979."

During the direct examination of defendant Dunbar by relator's counsel, the following testimony was elicited:

"Q. Could you explain the procedure which you customarily follow when you audit and allow claims, Mr. Dunbar?

"A. On the salary claims we — it is understood that they are approved but the others — you know — like the road claims and all of them they are reviewed and we sign them and anything that needs hashed over we hash it over to make sure they are legitimate claims."

Earlier in the testimony, counsel had called to the attention of the witness the language of paragraph 6 of the defendants' amended answer, as follows: "Defendants allege that the Loup County Board of Commissioners, with the actual or constructive knowledge of the relator, have audited and allowed claims against Loup County in substantially the same manner in

excess of one year prior to and including the June 19, 1978 meeting of the said Board and that by relator's failure to previously object to such alleged irregularities, relator is guilty of laches," and asked the following question:

"Q. Now, are you admitting there you failed to record a roll call vote on the taking of a motion to allow the claim for more than a year prior to the filing of this action?" At that time, the defendant's counsel made objection on the grounds that the open meetings law made certain violations crimes and that the defendant was being asked to incriminate himself in violation of the fifth amendment. The court asked the witness if he desired to invoke the fifth amendment. He said he did, and the court sustained the objection.

Counsel then asked a question concerning the taking and recording of a rollcall vote on the motion to allow claims. Objection was made by defendant's counsel and the objection was sustained. The relator's counsel then apparently abandoned his attempts to establish violations by Dunbar's own testimony.

On offer of the relator and over objection by defendants, there was received in evidence copies of various minutes covering the period May 16, 1977, to January 16, 1978, which indicate that claims were approved and allowed in substantially the following language: "motion to audit and allow claims, carried." Then followed a list of claims, including, in some instances, claims for salaries. There was no indication at any of these meetings that the roll had been called and the vote recorded.

We summarize the positions of the parties insofar as they relate to the point on which we decide the case. The relator contends the evidence shows that no rollcall vote was called and recorded on the motion of January 3, 1978, and that the purported correction made more than 1 year later is void.

The defendants assert that the minutes of a public body may be corrected, nunc pro tunc, to show what

actually occurred, and that this action may be taken either by the body itself or by its recording officer, in this case the county clerk. They further rely on the presumption that public officers have acted in accordance with the law. They claim the relator has failed to sustain his burden of showing that a rollcall vote was not taken.

Our consideration of the merits in this case must begin with an examination of the pertinent statutory provisions. Section 84-1413(2) specifically and clearly provides that when a governing public body (as defined by Neb. Rev. Stat. § 84-1409 (Reissue 1976)) acts on any question or motion duly moved and seconded, it shall do so by rollcall vote in an open session and the record shall state how each member voted, or if the member was absent or not voting.

Section 84-1414 provides that any motion, resolution, rule, regulation, ordinance, or formal action taken in violation of certain statutory provisions, including § 84-1413, shall be void. It further grants to any citizen the right to commence an action in the District Court for the purpose, among others, of declaring an action of the governing body void. It also provides penal sanctions for violations of the act committed knowingly. Actions to obtain a declaration of nullity must be commenced within 1 year of the governing body's final action.

It is to be noted that not only does § 84-1413(2) require a rollcall vote in open session but it also requires that "the record shall *state how each member voted, or if the member was absent or not voting.*" (Emphasis supplied.)

Neb. Rev. Stat. §§ 23-1301 and 23-1302 (Reissue 1977) make it the duty of the county clerk to keep the records of the board of county commissioners and "[t]o record in a book provided for that purpose all proceedings of the board."

The statutory provision makes it plain that actions by a public body in violation of certain portions of the

act are void. The concept that when the Legislature makes a certain requirement mandatory, failure to comply makes the action void, is not new. Statutes of this state have long required that "yeas" and "nays" shall be called and recorded whenever the governing body of a city enacts an ordinance, bylaw, or resolution entering into a contract. When such requirement is not met, the action is void. *Payne v. Ryan*, 79 Neb. 414, 112 N.W. 599 (1907); *Beverly Land Co. v. City of South Sioux City*, 117 Neb. 47, 219 N.W. 385 (1928); *City of Valentine v. Valentine Motel, Inc.*, 176 Neb. 63, 125 N.W.2d 98 (1963).

The defendants, however, rely upon the principle that public officers are presumed to have acted lawfully in performance of their duties, and that public records may be corrected, nunc pro tunc, to conform to the facts and to correct clerical errors. They argue that when these two principles are applied to the present case, the corrective action taken on January 15, 1979, remedies the deficiency and supports the trial court's finding. We must determine whether these principles are applicable here.

The purpose of a nunc pro tunc correction is to make the record speak the truth. Its purpose is not to correct oversights or failures in the performance of mandatory acts. *Beverly Land Co. v. City of South Sioux City, supra; City of Valentine v. Valentine Motel, Inc., supra.*

The relator produced the original minutes. The minutes do not indicate that a rollcall vote was made, nor do they show how each member voted. The record indisputably shows that the rollcall vote, if taken, was not recorded until more than 1 year later. Relator also introduced the minutes of other meetings showing a practice of not recording rollcall votes. Inquiry of a witness who presumably had knowledge of the facts as to what actually occurred on January 3, 1978, was prevented by the fifth amendment objection before the subject could be reached.

We note also that where a defendant in a civil case refuses to testify on the ground that the evidence may

incriminate him, the trier of fact may draw an adverse inference from his refusal. *Eldridge v. Herman*, 291 N.W.2d 319 (Iowa 1980); *Morgan v. United States Fidelity & Guaranty Co.*, 222 So. 2d 820 (Miss. 1969). The relator thus made a prima facie showing that a mandatory requirement had not been complied with. Was the corrective action itself, taken together with the presumption that a public official has acted lawfully, sufficient to overcome that prima facie showing and thus support the trial judge's factual findings?

The trial judge's finding that the rollcall vote was taken and recorded in the minutes was, as appears from comments made by him, based upon two factors: First, his interpretation of Dunbar's testimony, which we earlier quoted, concerning what took place when claims were allowed; and, second, his feeling that the corrective action taken in January 1979 satisfied the recording requirement under the nunc pro tunc principle. Dunbar's testimony related to a meeting which took place several months after the meeting of January 3, 1978. Its substance was that claims were discussed before they were allowed. It in no way pertained to what had occurred on January 3, 1978. There is, therefore, no testimony that a rollcall vote was taken, nor any testimony as to how a particular member voted or whether a member abstained. This leaves the corrective action of January 15, 1979, as the sole support for the trial court's finding. Is that sufficient? We think not, for if it were, the statute would be effectively emasculated. It is clear that the Legislature intended the statute to be mandatory; otherwise, it would not have provided that action taken in violation of the statute is void. This court is not free to disregard statutory requirements which are clearly within the legislative power to prescribe.

The primary obligation for properly recording proceedings by a board of county commissioners rests under statute upon the county clerk. §§ 23-1301 and 23-1302. Nonetheless, the open meetings act clearly places some supervisory obligations upon the commis-

sioners. When, at the meeting of January 10, 1978, the commissioners approved the minutes of the meeting of January 3, 1978, they could have observed that the minutes did not show that a rollcall had been taken, nor how the individual members had voted, nor whether there were abstentions. A correction to conform with the actual facts could have been made at that time.

We have previously held that the presumption that a public official has acted in conformity with the law is not sufficient to meet a statutory requirement that action mandated by statute be spread on the record. *Hull v. City of Humboldt*, 107 Neb. 326, 186 N.W. 78 (1921); *City of Valentine v. Valentine Motel, Inc.*, *supra*.

The first-cited case involved the validity of an ordinance. The applicable procedural statute required that "'on the passage or adoption of every by-law or ordinance, the yeas and nays shall be called *and recorded.*'" (Emphasis supplied by the court.) *Hull*, *supra* at 328, 186 N.W. at 79. The statute also required the reading of the ordinance on final passage, but made no specific provision that the fact of reading be recorded. The court held that, since the statute did not specifically require the recording of the fact of reading, the fact that the mandatory requirement of spreading the yeas and nays on the record had been met was sufficient to raise the presumption that the ordinance had been read.

City of Valentine v. Valentine Motel, Inc., *supra*, involved a statute (Neb. Rev. Stat. § 17-407 (Reissue 1962)) regulating the passage of an annexation resolution or ordinance, which provided: "'[T]he resolution, and the vote thereon, shall be spread upon the records of the council or board.'" *City of Valentine*, *supra* at 64, 125 N.W.2d at 100. The record of the minutes showed that the resolution of annexation had been offered and seconded. The resolution was contained in the minutes. No vote on the ordinance was recorded. About 6 months later, after litigation attacking the validity of the ordinance had been commenced, the

council adopted an amendment, nunc pro tunc, to show that the vote had been taken and spread on the record. This court held: "The provisions of such a statute requiring the spreading upon the record of the council of the vote thereon were intended to require an indisputable record of the action actually taken, and so that the public might have an opportunity to know how the elected officials voted thereon. . . . A city council may, under some circumstances, correct its own record, nunc pro tunc, to show the adoption of a resolution or ordinance and to record the truth of how it was voted upon. It may not, however, by such action show that the separate requirement that these actions be spread upon the record of the minutes of the council was performed prior to the time that the spreading upon the minutes actually took place." (Syllabus of the court.) The opinion in the above-cited case sufficiently develops the rationale for the holding.

We hold in this case that the provision of § 84-1413(2), "the record shall state how each member voted, or if the member was absent or not voting," cannot be satisfied by a nunc pro tunc amendment showing the recording of the vote in the minutes was performed prior to the time the actual recording in the minutes took place.

The cause is remanded for further action in accordance with this opinion.

REMANDED WITH DIRECTIONS.

KRIVOSHA, C.J., dissenting.

If, in fact, the majority opinion holds, as I believe it does, that the provisions of the open meetings law (Neb. Rev. Stat. §§ 84-1408 to 84-1414 (Reissue 1976)) preclude a public body from correcting its own records, nunc pro tunc, to reflect what in fact took place, I must respectfully dissent. I believe that the majority in this case has both misconstrued the open meetings law and the evidence in this record.

It is clear beyond dispute that at common law a municipal council may at any time correct its minutes

to reflect the truth. The general rule as stated in 56 Am. Jur. 2d *Municipal Corporations* § 179 (1971) is as follows: "A municipal council may, at a subsequent meeting, if no intervening rights of third persons have arisen, order the minutes or record of its own proceedings at a previous meeting to be corrected according to the facts, so as to make them speak the truth, although the record has once been approved."

Many jurisdictions which have been called upon to examine this proposition have reached such a conclusion. In *Williams v. Longtown School Dist. No. 71 of Perry Co.*, 468 S.W.2d 673, 675-76 (Mo. App. 1971), the court said: "The board of directors of a school district has the power to correct the record of the proceedings had at a previous meeting so as to make them speak the truth and especially when the correction consists of supplying some omitted fact or action and is done, not to contradict or change the original record, but to have the record show that a certain action was taken or thing done which the original record fails to show. Parol evidence is also admissible for the same purpose."

Likewise, in *State ex rel. Wineholt v. LaPorte Superior Court No. 2*, 249 Ind. 152, 157, 230 N.E.2d 92, 95 (1967), the court there said: "There is no question that a County Council has a right to correct the minutes of its council meetings and make *nunc pro tunc* entries where errors have occurred by the secretary in properly recording the same. Modifications and amendments may be made where no intervening vested rights are involved."

For other cases supporting the general rule that county boards and councils have the authority to amend or correct their minutes, nunc pro tunc, see the following: *Olympian-Tribune Pub. Co. v. Byrne*, 28 Wash. 79, 68 P. 335 (1902); *R.R. v. Cherokee County*, 195 N.C. 756, 143 S.E. 467 (1928); *Oliver v. Highway Commission*, 194 N.C. 380, 139 S.E. 767 (1927); *R.R. v. Forbes*, 188 N.C. 151, 124 S.E. 132 (1924); *Marengo*

County v. Barley, 209 Ala. 663, 96 So. 753 (1923); *Jeffers v. Wharton*, 240 Ala. 21, 197 So. 358 (1940); *Bathurst v. Course*, 3 La. Ann. 260 (1848); *The People v. Wabash Ry. Co.*, 314 Ill. 513, 145 N.E. 733 (1924); *The People v. C. & E.I. Ry. Co.*, 314 Ill. 382, 145 N.E. 714 (1924).

Moreover, the authorities are clear that "[a]fter the record has been amended, it is entitled to the same respect as an original record." 56 Am. Jr. 2d *Municipal Corporations* § 179 at 231 (1971). See, also, 20 C.J.S. *Counties* § 91(c) (1940).

For the action of the county board, as reflected by the minutes herein, to be invalid and for the decision of the trial court finding the action valid, we must therefore find something in the open meetings law which compels that result. In *Egbert v. Wenzl*, 199 Neb. 573, 576, 260 N.W.2d 480, 482 (1977), we said: "Statutes are not to be understood as affecting any change in the common law beyond that which is clearly indicated." Likewise, see, *Paulsen v. Courtney*, 202 Neb. 791, 277 N.W.2d 233 (1979); *Davis v. Walker*, 170 Neb. 891, 104 N.W.2d 479 (1960). I find nothing in the open meetings law or the evidence in this case which justifies the conclusion reached by the majority. Neb. Rev. Stat. § 84-1413 (Reissue 1976) provides that "[a]ny action *taken* on any question or motion duly moved and seconded shall be by roll call vote of the public body in open session, and the record shall state how each member voted, or if the member was absent or not voting." (Emphasis supplied.) This obviously means the entire record and not just any single line in the record.

Likewise, § 84-1414 provides: "Any motion, resolution, rule, regulation, ordinance or formal action of a public body *made or taken* in violation of . . . shall be declared void by the district court." (Emphasis supplied.) The act which will result in a declaration of invalidity is the failure to *make* or *take* the vote in accordance with the statute, not, as suggested by the

majority, the failure to *record* the vote. Nothing in the open meetings law has made the failure to record the vote, if in fact it was properly taken, grounds to nullify the action of the public body.

The particular minutes under attack provide that Commissioners Schrup, Dunbar, and Pollard were present. They are all of the commissioners. Moreover, they now provide: "Motion made by Pollard, seconded by Schrup, that the minutes of the January 3, 1978 meeting of the Loup County Commissioner be corrected *to reflect* the vote of the Board on the Action *taken* in setting the salaries of the county officials for the terms of office beginning January 4, 1979, *said* vote being *yes, unanimous.*" (Emphasis supplied.) To be sure, the language is not as articulate as one might desire. Nevertheless, no one can reach any other conclusion but that the "vote being yes, unanimous" meant that Commissioners Schrup, Dunbar, and Pollard all voted yes. In my view, not only has the spirit of the open meetings law been met but I believe that the letter has likewise been met. To hold otherwise, as we are here doing, is to impose technical requirements upon part-time county commissioners beyond that which should be made and far in excess of anything the open meetings law was intended to require. The majority is now saying that persons who relied upon a salary increase and who ran for office in reliance on that salary increase should now be denied their just compensation because the minutes of the meeting of the county commissioners were not as artfully drafted as they might otherwise have been. Such a conclusion is neither required nor desirable.

There is no evidence in this record to discredit the record of the commissioners' meeting. The relator concedes that he does not know what in fact took place at the meeting. We are called upon to set aside an official record based upon the fact that a single county commissioner, at the direction of his lawyer, sought to exercise the fifth amendment for whatever

reason he may have chosen to do so. There is, however, not a single shred of evidence that a vote was not taken on the date and at the meeting in question. Yet, without hesitation, we set aside that action and ignore the finding of fact made by the trial court, which had the opportunity to see and observe the witnesses.

The trial court specifically found that the county board did take a rollcall vote on its action regarding the setting of salaries for Loup County officers on January 3, 1978. I see no basis for disregarding that finding and I certainly find no legal basis for declaring that the open meetings law precludes a public body from lawfully reflecting what in fact took place. To be sure, if it did not take place, such could not be done after the fact. That is not the record we have before us here and is not the ruling we are asked to make. I am not unmindful of our earlier decisions in *Payne v. Ryan*, 79 Neb. 414, 112 N.W. 599 (1907); *Beverly Land Co. v. City of South Sioux City*, 117 Neb. 47, 219 N.W. 385 (1928); and *City of Valentine v. Valentine Motel, Inc.*, 176 Neb. 63, 125 N.W.2d 98 (1963). They can be distinguished if one attempts to do so, but admittedly the distinctions are narrow.

It appears strange to me for the court to conclude that if an erroneous statement is "spread upon the records," it may be corrected, nunc pro tunc, to reflect the truth; but if, in fact, the legally required action was taken but omitted from the record, a correction cannot be made nunc pro tunc. I find no basis for that rule and do not believe the above-cited cases holding such to be the rule were correctly decided. I would overrule *Payne v. Ryan, supra; Beverly Land Co. v. City of South Sioux City, supra;* and *City of Valentine v. Valentine Motel, Inc., supra,* and affirm the judgment of the trial court.

McCOWN and BRODKEY, JJ., join in this dissent.

WAYNE LAVALLEUR, APPELLEE, AND A & A EQUIPMENT CO., A CORPORATION, APPELLANT, V. STATE AUTOMOBILE & CASUALTY UNDERWRITERS, APPELLEE.

302 N.W.2d 362

Filed February 20, 1981. No. 43012.

1. **Insurance: Liability.** Insurance companies have the same right as individuals to limit their liability.
2. **Insurance: Contracts.** In construing a contract, the instrument must be read as a whole, giving force and effect to all its provisions to determine whether or not any ambiguity exists and whether, if such ambiguity does exist, the contract is confusing and uncertain in its terms.

Appeal from the District Court for Phelps County: BERNARD SPRAGUE, Judge. Affirmed.

William H. Sherwood and Charles J. Cuypers of Sherwood Law Office for appellant.

Kenneth H. Elson for appellee.

Heard before BOSLAUGH, BRODKEY, and WHITE, JJ., and CASE and GARDEN, District Judges.

CASE, District Judge.

This case arose in the District Court of Phelps County; the plaintiff Wayne Lavalleur being the owner and operator of a welding and repair business in Holdrege, Nebraska. His coplaintiff A & A Equipment Co. was the owner of a backhoe which was repaired by Lavalleur. The defendant insurer issued a manufacturers' and contractors' liability policy to Lavalleur. Lavalleur repaired a broken bracket on a hydraulic cylinder of the backhoe owned by A & A Equipment Co. After Lavalleur completed the repairs and departed the premises, the backhoe was severely damaged by fire.

Lavalleur, in a separate action, was sued by A & A Equipment Co. on this set of facts. The defendant insurer refused to defend Lavalleur in that action; whereupon Lavalleur retained counsel and defended at his own expense. A judgment was rendered in that

action for A & A Equipment Co. in the sum of $2,761.31, together with interest and costs of the action.

Lavalleur then assigned his rights under the policy to A & A Equipment Co., the sole appellant herein, and it filed this action under the assignment. In this action, A & A Equipment Co. alleged the fire, the insurance coverage, assignment of rights, and the refusal of the defendant to defend the original action, and prayed for judgment it had recovered from Lavalleur and costs of rental during the period of repair.

The defendant, in its answer, admitted to refusing to pay Lavalleur's claim or to defend the suit, also admitting the entry of the judgment. The defendant, for an affirmative defense, alleged the policy provided an exclusion to coverage under the clause "completed operations hazard," and that the damage to property was not covered within that clause.

The clause in the policy provides that this insurance does not apply to property damage within the completed operations hazard (1) when all operations to be performed by or on behalf of the named insured under the contract have been completed, (2) when all operations to be performed by or on behalf of the named insured at the site of the operations have been completed, and (3) when the portion of the work out of which the injury or damage arises has been put to its intended use by any person or organization other than another contractor or subcontractor engaged in performing operations for a principal as a part of the same project. "Products hazard" is defined as property damage arising out of the named insured's products or reliance upon a representation or warranty made at any time with respect thereto, but only if the property damage occurs away from the premises owned by or rented to the named insured and after physical possession of such products has been relinquished to others.

The position of the appellant is that Lavalleur was

obligated to inspect and extinguish any spark or flames; that the fire which damaged the backhoe was already ignited at the time that Lavalleur left the premises; and that the operation was not completed because of his failure to inspect.

The matter was tried to the District Court on stipulated facts, the parties agreeing to a series of 23 stipulations encompassing the factual situation. The stipulations include the following:

"7. When Lavalleur left the farm where he repaired Plaintiff's backhoe, he did not leave any tools, equipment or repair parts at the farm and the repairs had been completed.

"8. Immediately after completing the welding repair work on plaintiff's backhoe, Lavalleur left the farm where the repair was done, and approximately twenty minutes later the backhoe was severely damaged by fire.

"9. Immediately before and at the time he left the farm where he repaired the backhoe, Lavalleur had not seen any flames, smoke or any other indication of fire in any part of the backhoe repaired by Lavalleur using his welding equipment.

"10. The damage to Plaintiff's backhoe was caused by Lavalleur's negligence."

The District Court, on the stipulated facts, dismissed the action and taxed costs to the plaintiffs.

The sole issue here is whether the operation was completed when Lavalleur left the premises, with the liability of the defendant insurer terminating at that point. This court has had opportunity to decide a like question in *Steinheider & Sons, Inc. v. Iowa Kemper Ins. Co.*, 204 Neb. 156, 281 N.W.2d 539 (1979). There, the plaintiff was in the cattle feed business and had mistakenly given out a product which was thought to be a mastitis preventative in dairy cattle, when, in reality, the product was a very strong disinfectant for sterilizing hog barns. The purchaser made claim against Steinheider; and upon denial by the insurer to

defend under the completed operations hazard clause, Steinheider brought the action against his insurer. There, we held that while it may very well be true that the alleged negligence occurred on the premises and, in fact, Steinheider may have liability to the customer, it is likewise clear the property damage did not occur until after delivery and was off the premises, as contemplated by the completed operations hazard or a products hazard.

Also, in *Kansas-Nebraska Nat. Gas Co., Inc. v. Hawkeye-Security Ins. Co.*, 195 Neb. 658, 240 N.W.2d 28 (1976), we had the opportunity to pass on a similar question. There, one Gilbert O. Huston excavated a sewer trench in 1959, damaging the plaintiff's natural gas line. Huston refilled the trench without notifying the gas company. In 1965 Huston purchased a policy from the defendant which did not provide coverage for completed operations, as in the instant case. In 1966 a fire occurred at the site, resulting in a death; the fire being caused by a leak caused by Huston's earlier damage to the gas line. There, the gas company took an assignment of Huston's rights and brought action against the insurer, alleging coverage under the policy issued to the defendant Huston. The defendant insurer denied coverage for completed operations. We there held, and so hold here, that in the resolution of a controversy concerning the meaning of an insurance contract and the coverage therein, the contract must be viewed as a whole, and the insurance contract must be construed as to give effect as to the intent of the parties at the time the contract was made. See, also, *Kent v. Dairyland Mut. Ins. Co.*, 177 Neb. 709, 131 N.W.2d 146 (1964).

Both Huston and the insurer did not intend completed operations coverage. If Huston had desired completed operations coverage, he could have done so by paying an additional premium.

The policy herein provided for five different areas of coverage, including manufacturers' and contractors'

liability, completed operations, and products liability. The insured, Lavalleur, purchased only the manufacturers' and contractors' liability; and, although available, he did not purchase the other coverages.

In a few cases dealing with the time when an operation could be deemed completed, within the meaning of a completed operations exclusionary provision, it has been held that the operation was or could be considered completed, notwithstanding that some part of the work, including inspection, had not been performed at the time of the injury.

In *Standard Acc. Ins. Co. v. Roberts*, 132 F.2d 794 (8th Cir. 1942), it was held that the exclusion applied to an injury suffered by purchasers of a gas-operated refrigerator when the connection between the refrigerator and the gas pipes in the house permitted gas to escape into the house during the night following installation. The court rejected the contention of the insured that the policy covered results from improper installation, including improper inspection to make sure the installation was safe.

In *Green v. Aetna Insurance Company*, 397 F.2d 614 (5th Cir. 1968), where a repairer of a drilling-rig collar returned the collar without having repaired one end of it as required by the repair agreement, the court held that the injury was excluded under the "completed operations" section of the products liability exclusion. The court took the position that the failure of the repairer to repair both ends of the collar did not preclude the resulting injury from being considered as within the completed operations exclusion.

In *Tidewater Associated Oil Co. v. Northwest Casualty Co.*, 264 F.2d 879 (9th Cir. 1959), where an injury occurred because an oil company truckdriver apparently negligently poured gasoline instead of stove oil into an oil can, causing an explosion and injury, it was held that the injury was within the products liability exclusion since the operation of the insured oil company in delivering the oil to the company had

been completed the day before the injury occurred. The court pointed out that any possible contention that it had not been completed was negatived by the provisions in the policy with respect to the effect of improper, defective performance upon a determination of completion of operations.

In *Dickert v. Allstate Insurance Co.*, 121 Ga. App. 760, 175 S.E.2d 98 (1970), where an insured connected certain water pipes and 3 days after completion of installation leakage occurred, causing damage to the residence, the court held that the damage was excluded under the products liability completed operations exclusion; thus adopting the position, without express discussion, that the installation operation had been completed when the insured left the premises within which the work was done, and that the question of completion was not considered affected by negligence in the performance of the work or the failure of the completed work to function properly.

Liability of the plaintiff Lavalleur, which arose after he had completed his work, left the scene without leaving any tools, equipment, or repair parts, and upon leaving had not seen any flames, smoke, or any other indication of fire in any part of the backhoe, in our opinion, could only arise under the completed operations and products liability insurance coverage which Lavalleur had failed to purchase from the insurer.

We conclude that there is complexity involved in the policy provisions herein, but there is no ambiguity; as such, the insurance company had the right to limit its liability by including those limitations in the policy definition. For the reasons stated above, the judgment of the District Court is affirmed and the costs of the action, including the cost of appeal, are herewith taxed to the appellant, A & A Equipment Co.

AFFIRMED.

ROY MEIERHENRY AND JOSEPH ERMAN, APPELLEES, V. WAYNE SMITH, APPELLANT.

302 N.W.2d 365

Filed February 20, 1981. No. 43079.

1. **Injunction: Restrictive Covenants: Waiver.** Nonobjection to trivial breaches of a restrictive covenant does not result in loss of the right to enforce the covenant.
2. **Injunction: Restrictive Covenants.** Injunction is an appropriate remedy for violation of a restrictive covenant.

Appeal from the District Court for Douglas County: DONALD J. HAMILTON, Judge. Affirmed.

Daniel W. Ryberg for appellant.

Philip H. Forehead for appellees.

Heard before KRIVOSHA, C.J., MCCOWN, BRODKEY, and HASTINGS, JJ., and STUART, District Judge.

STUART, District Judge.

Plaintiffs and appellees (owners and residents in Royalwood Estates, a residential subdivision in Douglas County, Nebraska) brought this action for injunctive relief. After trial, the District Court enjoined the defendant and appellant (a neighboring owner and resident) from having a free-standing 40-foot CB radio antenna on his lot.

Protective covenants on all parties' property provided in part: "No outside radio, television or other electronic antenna or aerial shall be erected on any building plot without the written consent of the undersigned." Defendant attempted to obtain permission from the developer to construct this antenna. Although a letter was written by the developer, this letter did not give such permission.

Defendant showed that over one-fourth of the landowners in the development had erected and maintained roof-mounted TV antennas, and thereupon argues that plaintiffs are estopped to complain about this violation.

The right to enforce restrictive covenants may be

lost by waiver or acquiescence of violation of the same. However, the circumstances of each case control whether there has been such a waiver or acquiescence.

"The criteria for determining this includes whether those seeking to enforce the covenants had notice of the violation and the period of time in which no action was taken; the extent and kind of violation; the proximity of the violations to those who complain of them; any affirmative approval of the same; whether such violations are temporary or permanent in nature; and the amount of investment involved.

"'As a rule, nonobjection to trivial breaches of a restrictive covenant does not result in loss of the right to enforce the covenant by injunction, and acquiescence in violations * * * which are immaterial and do not affect or injure one will not preclude him from restraining violations thereof which would so operate as to cause him to be damaged. . . .' 20 Am Jur. 2d, Covenants, Conditions, etc., s. 274, p. 835." *Pool v. Denbeck*, 196 Neb. 27, 34, 241 N.W.2d 503, 507 (1976).

We conclude that plaintiffs' failure to complain about the construction of roof-top TV antennas does not estop them from preventing the maintenance of a 40-foot free-standing CB radio antenna.

Defendant next argues that injunction is too harsh a remedy, particularly when others are permitted to continue their violations. However, defendant was aware of the restrictive covenants prior to purchasing his home. He knew he had not received permission to erect the antenna tower and knew that the neighbors were upset. In spite of this knowledge, defendant took the chance of erecting his antenna tower. "Injunction is a proper remedy to prevent violation of a restrictive covenant. A remedy at law may be inadequate, may result in a multiplicity of actions, and may permit the subversion of the plan of improvement and development to continue." *Reed v. Williamson*, 164 Neb. 99, 82 N.W.2d 18 (1957) (syllabus of the court).

The judgment of the District Court issuing a man-

datory injunction directing the removal of the antenna is affirmed.

AFFIRMED.

BRODKEY, J., concurs in result.

KRIVOSHA, C.J., dissents.

STATE OF NEBRASKA, APPELLEE, V.
ROBERT RECORD, APPELLANT.

302 N.W.2d 367

Filed February 20, 1981. No. 43142.

1. **Motions for New Trial: Appeal and Error.** A motion for new trial on the ground of newly discovered evidence is addressed to the sound discretion of the trial court and, unless an abuse of discretion is shown, its determination will not be disturbed.
2. **Motions for New Trial: Evidence.** Newly discovered evidence must be of such a nature that if it had been offered and admitted at the former trial it probably would have produced a substantially different result.

Appeal from the District Court for Douglas County: JOHN T. GRANT, Judge. Affirmed.

Thomas M. Kenney, Douglas County Public Defender, and Stanley A. Krieger for appellant.

Paul L. Douglas, Attorney General, and Patrick T. O'Brien for appellee.

Heard before KRIVOSHA, C.J., BOSLAUGH, MCCOWN, CLINTON, BRODKEY, WHITE, and HASTINGS, JJ.

BOSLAUGH, J.

The defendant, Robert Record, was convicted of first degree murder and was sentenced to life imprisonment on July 2, 1976. The judgment was affirmed in *State v. Record*, 198 Neb. 530, 253 N.W.2d 847 (1977).

On September 30, 1976, the defendant filed a motion for a new trial for newly discovered evidence. Later,

the motion was amended to also ask for post conviction relief. An evidentiary hearing was held on September 26, 1977. The motion was denied on November 20, 1979. The defendant has appealed from the order denying him relief.

The motion relates to the failure of the State to comply with a pretrial discovery order which directed the county attorney to furnish "a copy of all police reports" to counsel for the defendant. Although the form of the order was broader than the statute requires, apparently there was no objection to the order. See Neb. Rev. Stat. § 29-1912 (Reissue 1979).

The evidence shows that on or about September 1, 1976, the defendant's counsel discovered that the sheriff's office had made an investigation concerning a suspect named Frank Pilant, but that none of the reports concerning Pilant had been furnished to the defendant.

The record shows that while the crime was under investigation, the sheriff's office received information that the victim, Hendrik Dohmen, had been running around with Judy Pilant, the suspect's wife. The sheriff's office then made an investigation which included interviews with the suspect, his employer, and some of his friends, and a polygraph examination of the suspect. Further investigation substantiated that the suspect had been at a drive-in theater on the night of the crime. On the basis of this investigation, the sheriff's office concluded that Pilant had not committed the murder.

At about this time the sheriff's office received information that the murder had been committed by the defendant. Subsequently a confession was obtained from Edward Domalakes, an accomplice of the defendant, who was an eyewitness to the crime. Statements were obtained from several other witnesses who said that the defendant had told them that he had killed Dohmen. Ballistics tests established that

Dohmen may have been shot with a gun recovered from Domalakes.

A motion for new trial on the ground of newly discovered evidence is addressed to the sound discretion of the trial court and, unless an abuse of discretion is shown, its determination will not be disturbed. *State v. Mays*, 205 Neb. 730, 289 N.W.2d 545 (1980). Newly discovered evidence must be of such a nature that if it had been offered and admitted at the former trial it probably would have produced a substantially different result. *State v. Peery*, 205 Neb. 271, 287 N.W.2d 71 (1980).

The newly discovered evidence in this case did no more than show that someone else might have had a motive for killing the victim. The suspect and his wife had been separated for about a 2-week period and during this time the suspect's wife and the victim had been out together on three occasions. When the suspect and his wife reconciled, she told him about her relationship with the victim. There was no other evidence which suggested the suspect was connected with the crime.

The evidence concerning the suspect, which has been summarized above, must be contrasted with that produced by the State at the trial of the defendant. The testimony at the trial included that of the accomplice who was an eyewitness to the murder, together with several witnesses to whom the defendant had admitted that he committed the murder. There is additional evidence in the investigation file which was received at the hearing on the motion which corroborates the evidence of the State against the defendant.

The record fully supports the ruling of the trial court on the defendant's motion. It is not probable that the newly discovered evidence would have produced a different result at the trial if it had been offered and admitted. The failure to disclose the reports concerning this evidence in accordance with the pretrial discovery

order was not prejudicial to any substantial right of the defendant. Any error in that regard was harmless.

The judgment of the District Court is affirmed.

AFFIRMED.

IN RE INTEREST OF GOLDFADEN. STATE OF NEBRASKA, APPELLEE, V. BARBARA GOLDFADEN, APPELLANT.

302 N.W.2d 368

Filed February 20, 1981. No. 43159.

1. **Child Custody: Juvenile Courts: Jurisdiction.** The exclusive original jurisdiction given to the county court sitting as a juvenile court is not diminished by Neb. Rev. Stat. § 43-201 (Reissue 1978) where the child's custody is the subject of a preexisting District Court order issued pursuant to divorce proceedings.
2. ____: ____: ____. The juvenile court can intervene between the parents and the child only if the child's condition requires the state to use its power to protect the welfare of the child. The circumstances of the child must come within the juvenile statutes.
3. **Child Custody: Appeal and Error.** We review a child custody order de novo, giving due regard to the trial court which observed the witnesses and their manner of testifying, and will not ordinarily disturb such order unless there is a clear abuse of discretion or it is clearly against the weight of the evidence.

Appeal from the District Court for Platte County: JOHN C. WHITEHEAD, Judge. Affirmed.

George H. Moyer, Jr., of Moyer, Moyer & Egley and Wilbur L. Johnson of Johnson & Skorupa for appellant.

Paul Schumacher, Platte County Attorney, for appellee State of Nebraska.

Clay M. Rogers of Erickson, Sederstrom, Leigh, Johnson, Koukol & Fortune, P.C., for James Goldfaden.

Mark M. Sipple of Luckey, Sipple & Hansen, guardian ad litem for Michael and Lisa Goldfaden.

Heard before KRIVOSHA, C.J., BOSLAUGH, MCCOWN, CLINTON, BRODKEY, WHITE, and HASTINGS, JJ.

HASTINGS, J.

This action was commenced by the county attorney of Platte County pursuant to Neb. Rev. Stat. § 43-202(2) (b) and (c) (Reissue 1978) on behalf of two minor children, Michael James and Lisa Ann Goldfaden. The mother, Barbara Goldfaden, who had custody by reason of a marriage dissolution decree of the District Court for Douglas County, has appealed from an order placing custody of the children in their father, her ex-husband, James Goldfaden, subject to reasonable visitation privileges in herself and the maternal grandfather. The appellant assigns the following as error: (1) The county court erred in proceeding with an adjudication even though the record reflected that the children were wards of the District Court for Douglas County; and (2) The county court erred in granting custody of the children to the father. We affirm the District Court order which approved the county court adjudication.

On December 13, 1978, the Platte County attorney filed a petition in the county court of Platte County, alleging that Michael and Lisa were neglected children, as defined in § 43-202(2) (b) and (c). The petition alleged that the children lacked proper parental care by reason of the fault or habits of their mother, Barbara Goldfaden. The petition further alleged that after a preliminary hearing before the Platte County Mental Health Board on December 12, 1978, Barbara was determined to be dangerously mentally ill, and that the children were in danger because of the acts of violence by Barbara upon her father in the presence of the children.

The children were placed in the custody of the Platte County Department of Public Welfare under the supervision of Multi-County Service Unit 143, and the court appointed an attorney and guardian ad

litem to represent them. Barbara was admitted to the Norfolk Regional Center, where she was diagnosed as suffering from alcohol addiction and a passive-aggressive personality with hysterical and inadequate features. It was also later determined that she was addicted to valium.

On December 16, 1978, the children's father, James Goldfaden, filed a motion in the county court of Platte County, alleging that he was a person more fit and proper than foster care to have possession during the pendency of the proceedings. He further stated that he intended to file an application for modification of the divorce decree in the District Court for Douglas County to obtain custody of the children. On December 26, 1978, the county court entered an order finding Barbara to be in the Norfolk Regional Center, continued the adjudication hearing, ordered James to pay $190 per month per child as child support, and continued custody with the Platte County Department of Public Welfare.

On January 10, 1979, Barbara entered a general appearance in the Platte County Court by and through her attorney, and on March 26, 1979, she appeared personally and admitted the allegations contained in the juvenile petition. Based on that admission, the court found Michael and Lisa to be children as defined by § 43-202(2) (b) and (c), and set the matter for a final dispositional hearing on May 30, 1979. Pending the final dispositional hearing, the court ordered custody to remain in the Platte County Department of Public Welfare, granted both parents visitation privileges, and ordered Barbara to continue treatment programs which were in progress.

The adjudication hearing was held on May 30, 1979, in which Dr. Roger Cutshall, staff psychiatrist at the Norfolk Regional Center, was called to testify on Barbara's behalf. He stated that Barbara had been released from the hospital on April 4, 1979, as improved, but with an agreement requiring her to

continue on prescribed medications, to return for periodic medication checks, to abstain from the use of any alcoholic beverages, and to allow outpatient visits in her home. The doctor testified that Barbara was making satisfactory progress, and in his opinion she was not at that time dangerous to her children since the main source of the problem was alcohol, and as long as she remained sober the problem would probably disappear. On examination by the court, Dr. Cutshall testified that it was very important that she continue the treatment program because without it she would probably return to drinking. The doctor further stated that he would recommend the outpatient treatment for 6 months to a year to really see if she was functioning or not.

At the conclusion of the hearing the court determined that the best interests of the children would be to place them in the custody of their father under the supervision of Lutheran Family and Social Service of Nebraska and Multi-County Service Unit 143. The court granted Barbara twice-a-month visitation privileges. The court also retained jurisdiction, requiring Multi-County Service to monitor the placement of the children as well as the progress made by Barbara and to make periodic reports to the court. A review was scheduled for approximately 1 year in the future, to be heard on June 2, 1980. Barbara appealed the county court decision to the District Court for Platte County, which was subsequently affirmed. This appeal followed.

Appellant's first assignment of error is that the county court erred in proceeding with an adjudication even though the record reflected that the children were wards of the District Court for Douglas County, pursuant to the divorce decree of the parties. Barbara agrees that the county court had jurisdiction through the juvenile statutes to detain the children because of lack of parental care. However, she insists that once the emergency ended, the county court no longer

had original jurisdiction to determine the custody of the children. She further asserts that once the county court of Platte County had notice that Michael and Lisa were wards of the District Court for Douglas County, the county court should have stayed further proceedings and remanded the parties to the District Court to determine custody.

The juvenile court in each county has "(2) Exclusive original jurisdiction as to any child under the age of eighteen years . . . (b) who lacks proper parental care by reason of the fault or habits of his parent, guardian, or custodian; (c) whose parent, guardian, or custodian neglects or refuses to provide proper or necessary subsistence, education, or other care necessary for the health, morals, or well-being of such child . . . ." § 43-202(2)(b) and (c). Further, the jurisdiction of the juvenile court continues over a child brought before the court or committed under the act, "and the court shall have power to order a change in the custody or care of such child, if at any time it is made to appear to the court that it would be for the best interests of the child to make such change." Neb. Rev. Stat. § 43-209 (Reissue 1978).

Appellant calls our attention to Neb. Rev. Stat. § 43-201(4) (Reissue 1978), which states in pertinent part: "Nothing in this act shall be construed to deprive the district courts of their habeas corpus, common law, or chancery jurisdiction or jurisdiction acquired in an action for divorce, legal separation, or annulment . . . ." The issue raised was considered by this court in *Schleuter v. McCuiston*, 203 Neb. 101, 277 N.W.2d 667 (1979). Is the exclusive original jurisdiction given to the county court sitting as a juvenile court diminished by § 43-201, where the child's custody is the subject of a preexisting District Court order issued pursuant to divorce proceedings? In *Schleuter* we answered the question in the negative for the following reasons:

"First, the county court decree was rendered pursuant to a petition filed by the county attorney as provided by section 43-205, R. S. Supp., 1978. Where the county attorney, as a representative of the state, determines that it is necessary to act to protect a child in the county, filing a petition in county court is the only procedure available to him. To hold that the county court could not act whenever a District Court has previously determined custody in the course of divorce proceedings would be to frustrate the exercise of the state's power under sections 43-201 through 43-218, R. S. Supp., 1978.

"Second, this was a proceeding to terminate parental rights. . . . It is true that parental rights were in fact not terminated in the county court proceeding. However, if we were to hold that the county court deprived itself of its jurisdiction by electing not to terminate parental rights after a full hearing on the merits, we would be basing the court's jurisdiction on the outcome of the proceeding, a result which would be patently absurd.

"We hold section 43-201, R. S. Supp., 1976, did not limit the county court's jurisdiction to determine the custody of a minor child whose custody was subject to a preexisting District Court order where the county court's jurisdiction was invoked by the county attorney acting to protect the child pursuant to section 43-205, R. S. Supp., 1978." *Schleuter* at 108-09, 277 N.W.2d at 671.

The reasoning in *Schleuter* is sound, and we decline the invitation to abandon it. The juvenile court jurisdiction as exercised pursuant to the juvenile statutes is to some extent exclusive and the proceeding brought by the county attorney is not just another custody proceeding. "Both the divorce court and the juvenile court are concerned on a primary basis with the welfare of the child, but, while their functions overlap, the basis of their jurisdiction and the scope of their powers differ. The divorce court is concerned with the legal custody of the children as between the parents.

The juvenile court can intervene between the parent and the child only if the child's condition requires the state to use its power to protect the welfare of the child. The circumstances of the child must come within the statute." *State ex rel Juv. Dept. v. Christy*, 7 Or. App. 608, 616, 492 P.2d 476, 479 (1972).

The juvenile court is not depriving the District Court of its jurisdiction acquired in the divorce action. It is merely exercising its exclusive original jurisdiction to intervene for the protection, welfare, and safety of the child. Once this jurisdiction has been invoked, the court has the authority to order a change in custody where necessary, if in the best interests of the child. § 43-209.

The appellant further assigns as error the award of custody to the father. We review the case de novo, giving due regard to the trial court which observed the parties and the witnesses and their manner of testifying. A custody order will not ordinarily be disturbed unless there is a clear abuse of discretion or it is clearly against the weight of the evidence. *Curfman v. Curfman*, 207 Neb. 1, 295 N.W.2d 299 (1980).

The evidence indicates that Michael has been experiencing adjustment problems due to the frequent shifting of family caretakers, producing in him a sense of insecurity and uncertainty. This has resulted in an increase of immature behavior at school and at home. A psychologist who evaluated Michael recommended that he be placed in a settled and secure home. The Multi-County Service Unit 143 caseworker, after doing a complete evaluation of both the homes and living situations of the parents, recommended placement of the children with the father. The same recommendation was made by the guardian ad litem. The evidence fully supports placement of the children with the father, James Goldfaden, and that decision will not be disturbed. The judgment of the District Court for Platte County is affirmed.

AFFIRMED.

MARY JANE RITCHEY, APPELLEE AND CROSS-APPELLANT, V. MARVIN RAY RITCHEY, APPELLANT AND CROSS-APPELLEE.

302 N.W.2d 372

Filed February 20, 1981. No. 43211.

1. **Child Custody: Sexual Misconduct.** Custody of minor children is to be determined by their best interests. In making this determination, the sexual misconduct of a parent is only one of several factors to be considered. Other factors are general considerations of the moral fitness of the parents; the emotional relationships between the children and their parents; and the age, sex, and health of the children.
2. **Child Custody: Appeal and Error.** Although we review an award of custody de novo, the determination of the trial court will not ordinarily be disturbed on appeal unless there is a clear abuse of discretion or it is clearly against the weight of the evidence.
3. **Attorney Fees: Costs.** The award of attorney fees and the taxing of costs are discretionary with the District Court.

Appeal from the District Court for Lancaster County: SAMUEL VAN PELT, Judge. Affirmed.

Vestecka, Gorham & Tegtmeier for appellant.

Knudsen, Berkheimer, Beam, Richardson & Endacott for appellee.

Heard before KRIVOSHA, C.J., WHITE, and HASTINGS, JJ., and HENDRIX and KNAPP, District Judges.

HASTINGS, J.

Marvin Ray Ritchey has appealed from an order of the District Court for Lancaster County dissolving the marriage of the parties and awarding custody of their minor child to the mother, Mary Jane Ritchey. The overlapping assignments of error are substantially as follows: (1) The court erred in failing to compel the petitioner to answer 33 interrogatories and sustained her objections on fifth amendment grounds, and the court erred in refusing to accept the interrogatories and objections into evidence; (2) The court erred in failing to find that the petitioner's relationship

with another man adversely affected the minor child; and (3) The evidence is not sufficient to support the finding that it is in the best interests of the child that he remain in the custody of the mother.

The petitioner, Mary Jane Ritchey, has cross-appealed, assigning as error: (1) The court erred in awarding the respondent 2 months' visitation each year during the summer months; and (2) The court erred in failing to allow the petitioner attorney fees and court costs. We affirm.

The parties were married on August 21, 1971, and had one child, Dean Edward Ritchey, born June 30, 1977. Both parties are employed by Burlington Northern, and both earn between $900 and $1,000 per month; Marvin as a brakeman and Mary Jane as a stenographer. Mary Jane's work hours are 7:30 to 4 p.m., Monday through Friday, and Marvin's hours fluctuate, but are normally 2:30 p.m. to 10:30 p.m., or 4 p.m. to midnight, with Sunday and Monday off. There is ample evidence showing that both parents are fit to have the care and custody of the child. A court-ordered custody investigation undertaken by the juvenile probation office concluded that either parent is fit to have the custody of the child, and no recommendation was made in favor of either one.

The main thrust of the appeal concerns what the appellant terms the moral fitness of Mary Jane. Most of the testimony and evidence concerned certain alleged actions on the part of Mary Jane which, according to the appellant, indicates that the father adheres to higher moral standards than does the mother. Specifically, when the couple separated and Mary Jane and their son, Dean, moved out of the home of the parties, Marvin undertook a full-scale monitoring of all activities of Mary Jane and her alleged paramour. Marvin, two male friends, and one hired private investigator watched her home day and night, followed her in cars, and communicated among themselves on their citizens band radios. Marvin went

so far as to have Mary Jane's garbage picked up and made available to him for his examination. He also took photographs of the interior of Mary Jane's home, including her laundry basket, her bedroom, and her dressing table. There was no indication in the record as to how Marvin gained access to the home on the date those pictures were taken, nor whether he had permission to do so.

The first assignment of error refers to 33 interrogatories which were served on Mary Jane prior to trial, all dealing with her relationship with her alleged paramour. Mary Jane objected to the interrogatories, based on the fifth amendment and Neb. Const. art. 1, § 12. One interrogatory was objected to as privileged. The trial court sustained the objections to the interrogatories. However, when the case was tried, Mary Jane was questioned on direct examination regarding her relationship with the particular man involved. The court commented that any privilege had been waived at that point and the respondent could cross-examine Mary Jane on nearly anything involving her relationship with that man.

The trial court's initial ruling permitting Mary Jane to invoke the privilege against self-incrimination was supported by Neb. Rev. Stat. § 25-1210 (Reissue 1979). Whether the sanction of dismissal of the action could have been invoked within the rule stated in *Schrad v. Schrad*, 186 Neb. 462, 183 N.W.2d 922 (1971), we need not consider because the respondent did not make such a motion at that time. We would observe in passing, however, that *Schrad* was decided on the basis of the "clean hands" doctrine, under the fault concept of divorce actions then existing. Respondent's motion to dismiss was not made until the close of petitioner's case, which was after the trial court had ruled that Mary Jane had waived any privilege and that Marvin's attorney was free to cross-examine her regarding her alleged extramarital activities. The court's refusal to admit the written inter-

rogatories and the petitioner's written objection into evidence was proper, since they had no relevance. There is no merit to the appellant's first assignment of error.

The second error assigned is that the court erred in failing to find that the petitioner's relationship with another man adversely affected the minor child. Mary Jane denied that her relationship with the "other man" was anything more than a friendship. However, assuming the man was her paramour, and there was sufficient evidence that the trial court could have come to that conclusion, that does not automatically make Mary Jane an unfit mother. In *Fisher v. Fisher*, 185 Neb. 469, 176 N.W.2d 667 (1970), we held that where a wife has been guilty of adultery, the court will give consideration to the nature of the act and the circumstances, its probable effects on the future welfare of the children, and the best interests of the children under all the circumstances of the case. We have also stated: "The fact that one of the parties to an action for the dissolution of marriage has committed adultery, although a relevant consideration, will not necessarily be determinative of who shall be awarded custody of the minor children of those parties." *Lockard v. Lockard*, 193 Neb. 400, 402-03, 227 N.W.2d 581, 583 (1975).

Sexual misconduct is only one of the factors which may be properly considered in determining the best interests of minor children. *Kringel v. Kringel*, 207 Neb. 241, 298 N.W.2d 150 (1980). Other factors are "general considerations of the moral fitness of the parents; . . . the emotional relationships between the children and their parents; and the age, sex, and health of the children . . . ." *Kringel* at 244, 298 N.W.2d at 153.

We review an award of custody de novo. However, the determination of the trial court will not ordinarily be disturbed on appeal unless there is a clear abuse of discretion or it is clearly against the weight of the

evidence. *Batenhorst v. Batenhorst*, 205 Neb. 601, 288 N.W.2d 740 (1980). We recognize that it is the trial court which saw the witnesses and observed the attitude of the parties at trial. Considering the youth of the child, the working hours of the parties, as well as the evidence that both parents are fit to have custody, we cannot say that the trial court abused its discretion in awarding custody to the mother. This is particularly true since there was no showing that any sexual misconduct on the part of Mary Jane has adversely affected the child, nor will have an adverse effect on him in the future. We therefore find that appellant's second and third assignments of error do not merit reversal.

The errors assigned by Mary Jane on cross-appeal involve, first, the question of whether 2 months of visitation per summer with Marvin is excessive. This was part of the extensive visitation schedule which basically included: (a) The father has visitation one weekend each month; (b) On weeks of no weekend visitation, the father has visitation 1 full day and ½ day per week; and on weeks with weekend visitation, the father has only the ½-day visitation; (c) The father has the child 1 week each Christmas holiday, alternating Christmas Day each year with the mother; the party not having visitation on Christmas Day will have visitation on Christmas Eve; (d) The father has visitation for up to 2 months each summer, and during those summer months the mother has the same visitation as granted the father in (a) and (b); and (e) The parties are to have reasonable visitation on birthdays and other holidays, to be worked out between the parties themselves.

"In a post-divorce custody proceeding a determination of what constitutes reasonable visitation rights, or periodic possession of minor children, lies within the discretion of the trial court. On appeal we will not disturb the determination except to remedy abuse of discretion." *Lueders v. Lueders*, 187 Neb. 539, 541, 192 N.W.2d 161, 163 (1971).

It is evident that a great deal of thought and work was put into establishing the visitation schedule, even to the extent of setting the exact hour when visitation is to begin and end. An attorney had been appointed by the court to represent the child in the negotiations for custody and visitation. We will not disturb this visitation schedule, because we find no abuse of discretion in awarding an extended visitation each summer. See *Hermance v. Hermance*, 194 Neb. 720, 235 N.W.2d 231 (1975).

On cross-appeal, Mary Jane further assigns that it was error for the court to fail to allow to petitioner the payment of her attorney fees and court costs. "The award of attorneys' fees and the taxing of costs is discretionary with the District Court." *Badberg v. Badberg*, 193 Neb. 844, 847-48, 229 N.W.2d 552, 555 (1975). There was no abuse of discretion.

The judgment of the District Court is affirmed. Petitioner is allowed $500 for the services of her attorney in this court, and the costs on appeal are taxed to the respondent.

AFFIRMED.

O'NEILL PRODUCTION CREDIT ASSOCIATION, A CORPORATION, APPELLEE AND CROSS-APPELLANT, V. JOHN SCHNOOR ET AL., APPELLEES, AND GALYEN PETROLEUM COMPANY, A CORPORATION, INTERVENOR-APPELLANT AND CROSS-APPELLEE.

302 N.W.2d 376

Filed February 20, 1981. No. 43247.

1. **Statutes.** A statute is not to be read as if open to construction as a matter of course. Where the words of a statute are plain, direct, and unambiguous, no interpretation is needed to ascertain the meaning. In the absence of anything to indicate the contrary, words must be given their ordinary meaning. It is not within the province of the court to read a meaning into

a statute that is not warranted by the legislative language. Neither is it within the province of a court to read anything plain, direct, and unambiguous out of a statute.

2. ____. Generally speaking, a statute should be construed so that an ordinary person reading it would get from it the usual accepted meaning. Rules of interpretation are resorted to for the purpose of resolving an ambiguity, not of creating it.

3. **Crops: Words and Phrases.** In general, the word "crops" means all products of the soil that are grown and raised annually and gathered in a single season.

Appeal from the District Court for Holt County: HENRY R. REIMER, Judge. Reversed and remanded with directions.

Arlen D. Magnuson for appellant.

Edward E. Hannon for appellee.

Heard before KRIVOSHA, C.J., MCCOWN, CLINTON, BRODKEY, WHITE, and HASTINGS, JJ., and RONIN, District Judge.

KRIVOSHA, C.J.

The instant appeal presents to the court a question of first impression involving the issue of whether cattle may be included within the meaning of crops as set out in Neb. Rev. Stat. § 52-901 (Reissue 1978). If cattle are considered crops, we are further asked to decide whether a petroleum products lien has priority over a previously filed security agreement covering the same cattle.

The trial court found that cattle are included within the meaning of the word "crops," but that the petroleum products lien does not have priority over a properly filed financing statement. There are a number of circumstances involved in the instant case, including matters between O'Neill Production Credit Association (O'Neill), appellee, and the various parties involved in this action other than Galyen Petroleum Company (Galyen), the intervenor-appellant. However, due to the manner in which we decide the issue of whether cattle are included within the meaning of crops, we

need not concern ourselves with any of those other matters and can dispose of this appeal as a matter of law. For the reasons more particularly set out hereinafter, we find that cattle are not included within the definition of crops pursuant to the provisions of § 52-901 and, accordingly, reverse and remand the instant appeal with instructions to the trial court to enter an order consistent with this opinion.

It is uncontested that Galyen had, at various times, sold to David P. Mueller petroleum products for which Galyen claimed a petroleum products lien, though there was a dispute at trial as to whether all the products sold to Mueller entitled Galyen to a petroleum products lien. Again, because of the manner in which we dispose of this appeal, we need not resolve that dispute. The parties further acknowledge and concede that O'Neill had a valid security agreement superior to the rights of Galyen, unless Galyen had a petroleum products lien covering the cattle which was superior to O'Neill's lien.

Section 52-901 provides as follows: "Any person who furnishes gasoline, diesel fuel, tractor fuel, oil, grease, or other petroleum products to another to be used in farm machinery for power or lubricating purposes in the production of any agricultural crop shall be entitled to a lien upon *all such crops produced* and owned by the person to whom such fuel or lubricant had been furnished to secure the payment of the purchase price thereof, upon compliance with the provisions of sections 52-901 to 52-904." (Emphasis supplied.) While Galyen concedes that the petroleum was not sold for use in the cattle, it argues that the petroleum was sold for the purpose of operating a pivot irrigation system which watered grass which was fed to the cattle, thereby entitling Galyen to a petroleum products lien upon the cattle. Galyen conceded at oral argument that if cattle are not held to be crops within the meaning of the petroleum products lien law, Galyen does not have a lien upon the cattle and the question of the

priority between the petroleum products lien and the security agreement is not reached. The principal reason underlying that premise is that agricultural liens are wholly dependent upon statute or special contract, and no such lien was given at common law. Courts are not to add to the terms of the statute in determining who is entitled to benefit. See 3 Am. Jur. 2d *Agriculture* § 10 (1962).

Turning then to the specific question of whether cattle are included within the meaning of crops under the petroleum products lien, we first must direct our attention to the oft-cited and well-established rules of construction concerning the interpretation of statutes. In *Bachus v. Swanson*, 179 Neb. 1, 4, 136 N.W.2d 189, 192 (1965), we said: "A statute is not to be read as if open to construction as a matter of course. Where the words of a statute are plain, direct, and unambiguous, no interpretation is needed to ascertain the meaning. In the absence of anything to indicate the contrary, words must be given their ordinary meaning. It is not within the province of a court to read a meaning into a statute that is not warranted by the legislative language. Neither is it within the province of a court to read anything plain, direct, and unambiguous out of a statute."

Likewise, we have held that: "Generally speaking, a statute should be construed so that an ordinary person reading it would get from it the usual accepted meaning. Rules of interpretation are resorted to for the purpose of resolving an ambiguity, not of creating it." *State ex rel. Finigan v. Norfolk Live Stock Sales Co., Inc.*, 178 Neb. 87, 90, 132 N.W.2d 302, 304 (1964). See, also, *Peck v. Dunlevey*, 184 Neb. 812, 172 N.W.2d 613 (1969).

Our reading of the statute leaves us with the conclusion that there is no ambiguity contained within the provisions of § 52-901 which requires us to resort to any form of interpretation and we may, as the rules suggest, resort to the ordinary meaning of the word

"crops" to determine the scope of the word.

Neither party has cited to us any cases in which this question has been resolved, and we have found relatively few. In the case of *Ellis, McKinnon & Brown v. Hopps*, 30 Ga. App. 453, 454, 118 S.E. 583, 584 (1923), the Georgia Court of Appeals defined crops as follows: "[C]rops are the product of the soil and do not include the increase of live stock." Likewise, in the case of *State Mutual Ins. Co. v. Clevenger*, 17 Okla. 49, 50-51, 87 P. 583 (1906), the Oklahoma court defined crops as follows: "'The word "crop," in its general signification, means the product of cultivated plants while growing, or that product after it has been harvested or severed from the stalk or root to which it was attached.'"

Black's Law Dictionary 338 (5th ed. 1979) provides the ordinary meaning of crop to be: "Products of the soil, as are annually grown, raised, and harvested." The word "crops" is defined in 25 C.J.S. *Crops* § 1 (1966) as follows: "In general, the word 'crops' means all products of the soil that are grown and raised annually and gathered in a single season." Similar definitions of the word "crop" may be found in Words and Phrases. All of the authorities indicate that the word "crops" refers to the product of cultivated plants and not of livestock. Nothing which has been brought to our attention nor which we are able to discover ourselves could possibly lead one to believe that the word "crops" in its ordinary meaning encompasses cattle. There may be even some question as to whether the natural grasses eaten by the cattle involved in this case and watered by the pivot irrigation system are crops. The demurrer filed by O'Neill to Galyen's petition in intervention claiming a petroleum products lien on the cattle should have been sustained. For that reason, we reverse the judgment of the trial court and remand the matter back to the District Court with instructions to enter an order in accordance with this opinion.

REVERSED AND REMANDED WITH DIRECTIONS.

THE OMAHA FISH AND WILDLIFE CLUB, INCORPORATED, APPELLANT, V. COMMUNITY REFUSE, INC., ET AL., APPELLEES.

302 N.W.2d 379

Filed February 20, 1981. No. 43258.

1. **Administrative Agencies: Jurisdiction: Injunction: Zoning.** Enactment of the Environmental Protection Act does not divest district courts of subject matter jurisdiction to enjoin proposed solid waste disposal areas alleged to be in violation of county zoning ordinances.
2. **Administrative Agencies: Injunction: Zoning: Parties.** The Department of Environmental Control and county zoning officials are not indispensable parties in a suit against a licensee for a solid waste disposal area where the suit is to enjoin against an alleged violation of a county zoning ordinance.

Appeal from the District Court for Cass County: RAYMOND J. CASE, Judge. Reversed and remanded with directions.

Michael J. Mooney of McCormack, Cooney, Mooney & Hillman, P.C., for appellant.

Herbert J. Elworth of Casey & Elworth for appellees.

Heard before BOSLAUGH, CLINTON, and BRODKEY, JJ., and REIMER and HIPPE, District Judges.

HIPPE, District Judge.

The plaintiff sued for an injunction. The object was to stop the defendants from establishing a solid waste disposal area on lands zoned for other purposes. A demurrer was sustained, the case dismissed, and plaintiff has appealed. We reverse and remand.

The Omaha Fish and Wildlife Club, Incorporated, asserted in its amended petition that it owns 269 acres of real property in Cass County. It complains that the defendants began establishing a solid waste disposal area on 320 acres of land zoned by the county, but the zoning does not permit such a use. The petition acknowledges that the defendants secured a license for their endeavor from the Nebraska Department of

Environmental Control and that the Cass County board and zoning administrator have approved the site. The petition concludes that Neb. Rev. Stat. § 23-114.05 (Reissue 1977) establishes the right to an injunction. That statute provides: "The . . . use of any . . . land in violation of . . . any [zoning] regulation made by the county board . . . shall be a misdemeanor. . . . In addition to other remedies, the county board or the proper local authorities of the county, as well as any owner or owners of real estate within the district affected by the regulations, may institute any appropriate action or proceedings to prevent such unlawful . . . use . . . . Any taxpayer may . . . compel specific performance, by the proper official or officials, of any duty imposed by . . . this act . . . ."

The defendants are Community Refuse, Inc., Community Refuse Disposal, Inc., Regional Landfill Systems, Inc., and Ronald B. Roots. Their demurrer raises two points. First, defendants claim that enactment of the Environmental Protection Act, Neb. Rev. Stat. §§ 81-1501 to 81-1532 (Reissue 1976), exclusively governs operations relating to solid waste disposal. By making the Department of Environmental Control the licensor for such enterprises, a court is without subject matter jurisdiction in a suit such as this one. Second, they claim that the department is essential to a complete adjudication of this suit and that plaintiff cannot proceed without making it a party.

There are two issues raised: (1) Did enactment of the Environmental Protection Act divest district courts of subject matter jurisdiction to enjoin proposed solid waste disposal operations alleged to be in violation of county zoning ordinances? and (2) Are the Department of Environmental Control and/or county zoning officials indispensable parties in a suit against a licensee for a solid waste disposal area where the suit is to enjoin against an alleged violation of a county zoning ordinance?

The District Court agreed with the defendants on the first issue and sustained the demurrer. We disagree on both issues, and reverse and remand with directions to overrule the demurrer.

The statute pertaining to injunctions against a violation of a county zoning ordinance is clear. There must be such a procedure, because § 23-114.05 enacts it. In this way, county zoning ordinances are self-policing. Not only can the county officials begin a suit, but other "affected" owners of real estate also can do so.

Jurisdiction in suits for injunction are in the district courts. Neb. Const. art. 5, § 9. This cannot be legislatively limited or controlled. *Village of Springfield v. Hevelone*, 195 Neb. 37, 236 N.W.2d 811 (1975). Thus, even if the provisions of the Environmental Protection Act could be read to "preempt" the field, as defendants assert, that could not divest the District Court of its constitutional chancery jurisdiction.

Neither does the licensing by the Department of Environmental Control affect local zoning rules. The act itself states, in § 81-1516: "Nothing in sections 81-1501 to 81-1532 nor any act of the director shall usurp the legal right of a local governing body to develop and enforce local ordinances, codes or rules and regulations on solid waste disposal equal to or more stringent than [these] provisions . . . nor shall [they] relieve the applicant from obtaining a license from a local governing body when required or relieve the person owning or operating a disposal area from responsibility for securing proper zoning permits or complying with all applicable local ordinances, codes or rules and regulations not in conflict with the provisions of sections 81-1501 to 81-1532."

We therefore conclude that enactment of the Environmental Protection Act did not divest district courts of subject matter jurisdiction to enjoin proposed solid waste disposal operations alleged to be in violation of county zoning ordinances.

The demurrer was not sustained on the basis of lack of indispensable parties. The question has been briefed and argued, however, and was presented here for decision.

When this case was originally filed, it had two causes of action. One was against the developers for an injunction, and the case still has that form. The other was against the county officials to order their enforcement of the zoning ordinance. Certain of the defendants demurred for improper joinder. Apparently, without action by the trial court, the plaintiff filed an amended petition eliminating the individual county officials and left as defendants in the first cause of action only, the following: Community Refuse, Inc.; Community Refuse Disposal, Inc.; Regional Landfill Systems, Inc.; and Ronald B. Roots. Those remaining defendants now contend that all of the original named defendants should be parties, and, in addition, they claim that the Department of Environmental Control is an indispensable party to the suit. On the question of parties, these defendants have had three distinct positions.

First, they claimed that the county officials could not be included in the suit, so the plaintiff dismissed them out by filing an amended petition. They then filed a written demurrer claiming that the Department of Environmental Control had to be included. In argument on the written demurrer, they added that the county officials were likewise indispensable, and that position is advanced here.

If this controversy cannot be determined without additional parties, then the court must order them brought in. Neb. Rev. Stat. § 25-323 (Reissue 1979). The controversy here involves the use of land. That is all an alleged zoning violation can involve. Neither the county officials nor the Department of Environmental Control will be using the land. Neither the Department of Environmental Control nor the county officials have authority to adjudicate whether the

proposed uses will violate the zoning regulations. We have just held that the jurisdiction for that subject is constitutionally lodged in the District Court. Therefore, there is no reason for the presence of either in this case to get the controversy determined. Thus, the controversy can be determined without their presence, and should be.

The order sustaining the demurrer and dismissing the amended petition should be reversed, and the case is remanded to District Court with directions to do so.

REVERSED AND REMANDED WITH DIRECTIONS.

STATE OF NEBRASKA, APPELLEE, V. DONALD HOLMES, APPELLANT.

STATE OF NEBRASKA, APPELLEE, V. JAMES BEARDSLEE, APPELLANT.

302 N.W.2d 382

Filed February 20, 1981. Nos. 43345, 43403.

1. **Wiretaps.** Neb. Rev. Stat. § 86-705 (Reissue 1976) requires that each application for a wiretap shall be made in writing upon oath or affirmation to a judge of the District Court, and shall include a full and complete statement of the facts and circumstances relied upon to justify the applicant's belief that an order should be issued. The application shall give a full and complete statement as to whether or not other investigative procedures have been tried and failed or why they reasonably appear to be unlikely to succeed.
2. ——. Upon such application the judge may enter an ex parte order, as requested or as modified, authorizing or approving interception of wire or oral communications within the territorial jurisdiction of the court in which the judge is sitting, if the judge determines on the basis of the facts submitted by the applicant that: (a) There is probable cause for belief that an individual is committing, has committed, or is about to commit a particular offense enumerated in Neb. Rev. Stat. § 86-703 (Reissue 1976); (b) There is probable cause for belief that particular communications concerning that offense will be obtained through such interception; (c) Normal investigative procedures have been tried and have failed or reasonably appear to be unlikely to succeed if tried or to be too dangerous; and (d) There is probable cause for belief that

the facilities from which, or the place where, the wire or oral communications are to be intercepted are being used, or are about to be used, in connection with the commission of such offense, or are leased to, listed in the name of, or commonly used by such person. Neb. Rev. Stat. § 86-705(3) (Reissue 1976).

3. ——. Neb. Rev. Stat. § 86-705(1)(c) (Reissue 1976) does not require the exhaustion of all possible or reasonable avenues of investigation. The statutory requirements are stated in the alternative, i.e., that other methods must have been tried and failed "or" that other procedures are unlikely to succeed or are too dangerous.

Appeal from the District Court for Lancaster County: WILLIAM D. BLUE, Judge. Affirmed.

Robert B. Creager of Berry, Anderson & Creager, and Toney Redman for appellants.

Paul L. Douglas, Attorney General, and Patrick T. O'Brien for appellee.

Heard before KRIVOSHA, C.J., BOSLAUGH, MCCOWN, CLINTON, BRODKEY, WHITE, and HASTINGS, JJ.

BRODKEY, J.

Donald J. Holmes and James Beardslee, defendants below, appeal to this court from their convictions and sentences by the District Court of Lancaster County, Nebraska, for the offense of conspiracy to possess marijuana with the intent to deliver, in violation of Neb. Rev. Stat. § 28-4,129 (Reissue 1975) (repealed 1979). The two separate cases involved in this appeal were consolidated for trial below and were also consolidated for argument and briefing in this court. The evidence on which the convictions were based was obtained by means of a wiretap interception of oral communications over defendant Holmes' telephone line, such wiretap having been authorized by an order of the District Court dated June 29, 1978, and issued pursuant to an application filed by the county attorney of Lancaster County under Neb. Rev. Stat. §§ 86-701 et seq. (Reissue 1976). We affirm.

By way of factual background, it appears that on June 29, 1978, an application for the wiretap was

executed by Ronald D. Lahners, county attorney for Lancaster County, Nebraska. The application sought an order authorizing the interception of telephone communications between Donald Holmes, Paul Barzar, William Prettyman, James Beardslee, Inez Beardslee, David Finn, and Kathy Hayes, as well as other individuals whose identities were then unknown, over three designated Lincoln telephone listings. The affidavit signed by Detective Thomas Rathbun of the Lincoln Police Department in support of the wiretap application, dated June 28, 1978, recited that the telephones in question were being utilized by the aforementioned parties in connection with the "possession, use, manufacturing, and delivery of controlled substances, which are narcotics and dangerous drugs. . . ." The affidavit, which is 20 pages in length and contains numerous pages of exhibits, includes a section entitled "History of Investigation," which, among other things, reviews in detail the surveillance of the parties conducted by the Lincoln Police Department over a period of 4 years and documents the possession and importation of narcotics between defendant Holmes in Lincoln, Nebraska, and defendant Beardslee in Wetmore, Texas; and also includes references to prior convictions of Holmes for the possession of various controlled substances.

The affidavit also contains a section entitled "Objectives of Investigation," which also sets forth the reasons and necessity for the wiretap, as follows:

"Affiant has been engaged in investigation of criminal activities relative to controlled substances, narcotics, and dangerous drugs for several years, and has received the benefit of training by fellow officers who have been engaged in such investigation for more than six years, and affiant and said fellow officers have conducted numerous investigations into networks for distribution of controlled substances, including schemes whereby communications concerning possession and delivery of controlled substances

are transmitted by telephone, as well as investigations whereby drug distribution networks are infiltrated by civilian and commissioned undercover officers. It is the experience of affiant and his fellow officers related to affiant that infiltration of a drug distribution network by an undercover agent requires at least several weeks time, may extend over a period of several months before undercover agent is able to gain the confidence of parties involved in such distribution networks to the extent that such parties will confide in the agent about possession and delivery of such substances, and that in many cases infiltration of established distribution by undercover agents is impossible because the agents are not long time acquaintances of the operators of such networks. It is further the experience of affiant and his fellow officers that infiltration of drug distribution schemes conducted by persons of the black race of Lincoln, Nebraska, cannot be readily accomplished by undercover agents of the white race due to cultural and racial traditions in Lincoln, Nebraska, and affiant states that no law enforcement agency conducting operations in Lincoln, Nebraska, currently has a black employee whose identity as law enforcement officer is not well known, nor any non-white undercover agents available to conduct such investigation. It is further the experience of affiant and fellow officers as reported to affiant that continuing optical surveillance of places known to be residences of persons suspected of engaging in distribution of controlled substances, is likely to produce information about the registered owners of vehicles who visit the premises, observations about the shape and size of parcels being carried to and from such residences by visitors, and some information about the occupant but is unlikely to produce, and in the experience of affiant, has failed to produce information concerning arrangments for delivery of controlled substances, the time and place of their arrival, or the location in which such sub-

stances are kept. Affiant states that interception of wire communications is necessary in order to overhear complete conversations which are in and of themselves evidence of conspiracies or other schemes or arrangements for possession, distribution, and delivery of controlled substances, narcotics and dangerous drugs, and affiant knows of no other investigative technique available in this case for obtaining such evidence. Affiant further states that he is aware of no undercover agent currently operating by authority of or in cooperation with the Lincoln, Nebraska, Police Department, the Lancaster County Sheriff's Office, or the Nebraska State Patrol, Division of Drug Control, or any other law enforcement agency, who has gained the confidence of or in any way infiltrated or has been otherwise able to hear conversations by the suspects mentioned in this affidavit, other than CI-1 [confidential informant]; affiant and other officers of the Lincoln, Nebraska Police Department have attempted to use CI-1 by equipping said CI-1 with electronic listening devices, and then sending said CI-1 into the residence of Donald J. Holmes, but said CI-1 has not been able to gain the confidence of either Donald J. Holmes or William Prettyman, Jr."

Based upon this affidavit, the District Court, on June 29, 1978, entered an order finding that there was probable cause to believe that the parties named in the affidavit had committed, or were about to commit, certain offenses which were among those enumerated in Neb. Rev. Stat. § 28-4,125 (Reissue 1975); and that probable cause existed to believe that the telephones from which the communications which were to be intercepted were being used in connection with the possession and delivery of narcotics and other drugs within the State of Nebraska. The court also found that there was probable cause to believe that communications pertaining to the possession and delivery of said drugs would be obtained through the interception proposed by the applicant; and that

normal investigative procedures had failed to or appeared unlikely to be successful in determining the time or place of the arrival of such controlled substances, the identities of the persons supplying, receiving, and delivering said substances, or the plan by which the distribution of the substances would be effectuated. The court ordered that the proposed interception could proceed, and directed that all intercepted communications of an incriminatory nature be transcribed into writing verbatim and filed with the court.

As a result of the information gathered from the interceptions authorized by the court in its order of June 29, 1978, defendant Holmes was charged, as was also James Beardslee, with conspiracy to possess marijuana with the intent to deliver and with possession of marijuana with intent to deliver. Defendant Holmes was also charged, in an additional count, with possession of a controlled substance, to wit: dihydrocodeine.

The defendants each moved the District Court for an order suppressing the intercepted telephone communications, and a hearing on the motion was held on June 13, 1979. On October 3, 1979, the District Court entered an order overruling the motions. A jury was waived by the defendants, and at trial, on October 17, 1979, the cases were consolidated for trial under facts stipulated by the agreement of the parties. At that time, the defendants also renewed their motion to suppress the communications intercepted under the court order.

In its well-reasoned and documented memorandum opinion, dated December 6, 1979, the District Court ruled that the affidavit in question was sufficient; that it alleged sufficient facts to establish probable cause; and that the court's order authorizing the wiretap was proper. On December 14, 1979, the District Court found the defendants guilty of the conspiracy charges, and the remaining counts were

dismissed on motion of the county attorney. The defendants' subsequent motions for a new trial were overruled, and each defendant was sentenced to serve a term of 1 year in the Nebraska Penal and Correctional Complex.

On appeal to this court, the defendants make the following assignments of error: (1) That the District Court erred in overruling defendants' motions to suppress evidence obtained as a result of the wiretap; and (2) That the court erred in finding that the order permitting the wiretap was supported by a sufficient affidavit.

At the outset, we note that § 86-705, the Nebraska statute governing the procedures to be followed to obtain the court's authorization for a wiretap, requires *inter alia* that each application shall be made in writing upon oath or affirmation to a judge of the District Court, and shall include a full and complete statement of the facts and circumstances relied upon to justify the applicant's belief that an order should be issued. The statute also requires that the applicant shall give a full and complete statement as to whether or not other investigative procedures have been tried and failed or why they reasonably appear to be unlikely to succeed. Section 86-705(3) then provides: "Upon such application the judge may enter an ex parte order, as requested or as modified, authorizing or approving interception of wire or oral communications within the territorial jurisdiction of the court in which the judge is sitting, if the judge determines on the basis of the facts submitted by the applicant that: (a) There is probable cause for belief that an individual is committing, has committed, or is about to commit a particular offense enumerated in section 86-703; (b) there is probable cause for belief that particular communications concerning that offense will be obtained through such interception; (c) normal investigative procedures have been tried and have failed or reasonably appear to be unlikely to succeed if

tried or to be too dangerous; and (d) there is probable cause for belief that the facilities from which, or the place where, the wire or oral communications are to be intercepted are being used, or are about to be used, in connection with the commission of such offense, or are leased to, listed in the name of, or commonly used by such person."

The principal issue raised by the defendants on appeal is the sufficiency of the allegations in the affidavit for the wiretap order to support the finding of the District Court with respect to the failure or futility of investigative procedures other than wire interception. In their brief on appeal, the defendants allege that the affidavit fails to demonstrate that any normal investigative techniques had been tried and failed or reasonably appear unlikely to succeed, if tried.

The court has, in several previous opinions, addressed the issue raised by the defendants, and we have consistently held that it is not necessary for the State to utilize all investigative techniques before making an application for a wiretap. See, *State v. Kolosseus*, 198 Neb. 404, 253 N.W.2d 157 (1977); *State v. DiMauro and Kessler*, 205 Neb. 275, 287 N.W.2d 74 (1980); *State v. Trader*, 205 Neb. 282, 287 N.W.2d 78 (1980). In discussing this issue this court, in *State v. Kolosseus*, *supra* at 414-15, 253 N.W.2d at 163, stated:

"It is to be noted that the language of subsection (1)(c) does not require the exhaustion of all other possible or reasonable avenues of investigation. It does not, in fact, require that other methods even be tried if the application demonstrates other procedures are unlikely to succeed or are too dangerous. The requirements are alternative, that is, other methods must have been tried and failed 'or' the second alternative must be demonstrated. In United States v. Smith, *supra*, the court said: 'Congress, in its wisdom, did not attempt to require "specific" or "all possible" investigative techniques before orders for wire taps could be issued. As United States

v. Giordano, 416 U.S. 505, 515, 94 S. Ct. 1820, 1827, 40 L. Ed. 2d 341 (1974), states — wire tap "procedures were not to be routinely employed as the initial step in criminal investigation," but it is equally true "that the statute does not require the government to use a wire tap only as a last resort." United States v. Kerrigan, 514 F. 2d 35 (9th Cir. 1975); United States v. Staino, 358 F. Supp. 852, 856-7 (E.D. Pa. 1973).' United States v. Vento, *supra*, makes exactly the same point. In that case the court said: 'In United States v. Armocida, this Court, in accord with the legislative history, adopted a "pragmatic" approach to subsection (c). We held that the government's showing is to be "tested in a practical and commonsense fashion." There is no requirement that every investigative methodology be exhausted prior to application for a section 2518 authorization. Investigators are not obliged to try all theoretically possible approaches. It is sufficient that the government show that other techniques are impractical under the circumstances and that it would be unreasonable to require pursuit of those avenues of investigation. The government must, however, fully explain to the authorizing judge the basis for such a conclusion.' United States v. Pacheco, *supra*, also points out that all possible, imaginable methods need not be tried. We conclude that what is required under the first alternative is that the application make a full and complete disclosure of all that has been done so that the court may make a judgment as to whether more should be required before a tap is authorized."

Our examination of the application and affidavit in evidence in this case satisfies us that all the necessary requirements for justification for issuance of the wiretap order in this case existed (including the subpoenas for the toll call records from the telephone company), and that normal police investigative techniques had either failed or were likely to fail.

The findings and judgment of the District Court

are correct, and we affirm the convictions of the defendants in their respective cases.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V.
HAROLD J. L. IRWIN, APPELLANT.

302 N.W.2d 386

Filed February 10, 1981. No. 43517.

1. **Sexual Assault: Appeal and Error: Courts.** The mentally disordered sex offender act, Neb. Rev. Stat. §§ 29-2911 to 29-2921 (Reissue 1979), does not authorize the courts of this state to review criminal proceedings unrelated to a defendant's status as a sex offender.
2. **Sentences: Appeal and Error.** In the absence of an abuse of discretion, a sentence imposed within statutory limits will not be disturbed on appeal.
3. **Constitutional Law: Appeal and Error.** For a question of constitutionality of a statute to be considered in this court, it must be properly raised in the trial court. If it is not raised in the trial court, it will be considered as waived in this court.
4. **Constitutional Law.** A person may attack the constitutionality of a statute only when and so far as it is being or is about to be applied to his disadvantage; and to raise the question he must show that the alleged unconstitutional feature of the statute injures him and so operates as to deprive him of a constitutional right. A party to a suit will not ordinarily be permitted to attack the constitutionality of a statute in a case where his rights and interests are not invaded or affected by its provisions.

Appeal from the District Court for Adams County: FRED R. IRONS, Judge. Affirmed.

Stephen A. Scherr, Adams County Public Defender, for appellant.

Paul L. Douglas, Attorney General, and Martel J. Bundy for appellee.

Heard before KRIVOSHA, C.J., BOSLAUGH, MCCOWN, CLINTON, BRODKEY, WHITE, and HASTINGS, JJ.

BRODKEY, J.

Harold J. L. Irwin, the defendant and appellant herein, appeals to this court from an order entered by the District Court of Adams County, Nebraska, sentencing the defendant to six consecutive terms of imprisonment of 5 years each, stemming from his 1972 conviction on six counts of rape. We affirm.

While the factual background of this case is amply set out in our decision of *State v. Irwin*, 191 Neb. 169, 214 N.W.2d 595 (1974), we will restate the pertinent facts that are applicable to this appeal. On February 17, 1972, Irwin was convicted after a jury trial on six counts of rape and one count of robbery. The offenses for which the defendant was convicted occurred in or near Hastings in Adams County, Nebraska, on separate occasions dating from April 21, 1969, to February 21, 1971. Irwin was sentenced on March 10, 1972, to a term of 20 to 25 years' imprisonment on the robbery charge. With regard to the rape convictions, a separate proceeding was instituted under the sexual sociopath act, Neb. Rev. Stat. §§ 29-2901 to 29-2910 (Reissue 1975), which statute was subsequently repealed in 1979. In the original proceedings, the defendant was found to be a sexual sociopath and was committed to the Nebraska Penal and Correctional Complex for an indefinite period. The defendant thereafter appealed his conviction and sentence to this court, and we affirmed the decision of the trial court in *State v. Irwin, supra.*

In 1979 the sexual sociopath act under which the defendant had been committed was repealed. It was superseded and replaced by L.B. 378, the new mentally disordered sex offender act, now appearing as Neb. Rev. Stat. §§ 29-2911 to 29-2921 (Reissue 1979). Thereafter, the defendant was returned to the District Court for disposition pursuant to the provisions of the new statute.

On May 8, 1980, the trial court determined that the defendant was a mentally disordered sex offender

under the new law; that the disorder was treatable; and that the recommended treatment was available in Nebraska. The defendant was sentenced to consecutive terms of 5 years each on the six rape convictions, each sentence to run consecutive to the other and concurrently with the balance of defendant's robbery sentence. The District Court also granted the defendant a credit of 8 years and 220 days on the aforementioned sentences for time spent in custody.

Irwin has appealed to this court, assigning as error: (1) That the District Court erred in imposing an indeterminate sentence of 20 to 25 years for the robbery conviction; (2) The court exceeded its discretion by imposing consecutive sentences of 5 years each for six counts of rape; and (3) The appellant's right to constitutional due process and equal protection is denied by imposition of a sentence under the new mentally disordered sex offender act.

At the outset, we note that § 29-2921, the statute under which the defendant was sentenced, states: "All persons now committed under Chapter 29, article 29, as either a sexual psychopath or a sexual sociopath, shall forthwith be returned to the district court which committed them for review and disposition consistent with the terms of section 29-2911 to 29-2921." The proceeding from which this case is appealed was instituted in the District Court pursuant to the directive found in the aforementioned statute in order to review the defendant's 1972 commitment as a sexual sociopath.

In his brief on appeal, the defendant would have us review his 1972 robbery sentence. This we cannot do. Section 29-2921 calls for the review of commitments made under the sexual sociopath law alone, and in no way authorizes this court, or the District Court, to review a conviction or sentence which is unrelated to the defendant's status as a sexual sociopath. The defendant's original commitment, based on the six rape charges was made under the old sexual sociopath act in a separate and distinct proceeding from the

criminal proceedings in which he was sentenced for the robbery conviction. The crime of robbery is not a sex offense. We are convinced that the new mentally disordered sex offender act does not authorize the courts of this state to review criminal proceedings unrelated to a defendant's status as a sex offender. The defendant already has had an opportunity to and did have his robbery conviction reviewed by this court in *State v. Irwin, supra,* and the opinion in that case clearly states that all *seven* offenses were before the court in that appeal.

Defendant's second assignment of error alleges that the trial court exceeded its discretion by imposing consecutive sentences of 5 years each on the six rape convictions. In *State v. Bridgmon,* 196 Neb. 714, 717, 246 N.W.2d 57, 59 (1976), this court stated: "The rule is firmly established in this state that in the absence of an abuse of discretion, a sentence imposed within statutory limits will not be disturbed on appeal." See, also, *State v. Painter,* 195 Neb. 183, 237 N.W.2d 142 (1976). While this court undoubtedly has the authority to reduce the sentences imposed upon the rape counts, we find no circumstances requiring or persuading us to do so in this case. We note that the defendant was originally convicted of rape under Neb. Rev. Stat. § 28-408 (Reissue 1964), since superseded by Neb. Rev. Stat. § 28-319 (Reissue 1979). Section 28-408, then in effect, provided for a penalty of imprisonment for a period not less than 3 years nor more than 20 years in the Nebraska Penal and Correctional Complex. At sentencing, the trial court imposed a penalty which was well within the statutory limits. The seriousness of the offenses committed by the defendant fully justified the six sentences imposed by the trial court. There was no abuse of discretion by the trial court in this case, and the sentences it imposed are approved.

Finally, we consider defendant's contentions with regard to the unconstitutionality of the new mentally

disordered sex offender act, in that the imposition of a sentence under that act deprives him of constitutional due process and equal protection of the law. We decline to review the issue of constitutionality of the statute in this appeal for several reasons. First, we have carefully reviewed the record of the proceedings before the District Court, and it is clear that the defendant did not raise the issue of the unconstitutionality of the statute in that proceeding, but raises it for the first time in this appeal. The general rule is stated in *State v. McConnell*, 201 Neb. 84, 89, 266 N.W.2d 219, 221 (1978), where we stated: "Defendant did not raise the constitutional issue in the trial court. It is raised for the first time on appeal. For a question of constitutionality of a statute to be considered in this court it must be properly raised in the trial court. If it is not raised in the trial court, it will be considered as waived in this court." See, also, *State v. Jacobsen*, 194 Neb. 105, 230 N.W.2d 219 (1975).

Second, it appears that the defendant is not at present facing any disadvantage under the statute in question. The defendant's constitutional arguments are difficult to follow, but it appears that he bases his contention of unconstitutionality on § 29-2920, under which section the state is required to notify the county attorney of the county where the mentally disordered sex offender was convicted within 90 days prior to the pending release from custody, and the county attorney is then required to commence a mental health board commitment proceeding against the offender. Defendant argues that under this procedure a person convicted of a sexual offense is subject to being recommitted in the mental health proceeding, which, defendant argues, constitutes double jeopardy inasmuch as it has been held that such confinement is in effect criminal punishment. Finally, defendant argues that the right of a convicted mentally disordered sex offender to request review of his case by the parole board is eliminated

because of the threat of a future mental health board commitment.

It is clear at the present time no such action for commitment has been filed or is pending against the defendant, and, in fact, may never be filed against him in view of the fact of the rather extensive sentences which he must serve on the various charges for which he had been convicted. However, even if the defendant should face commitment proceedings under the alleged unconstitutional statute, he will at that time have the opportunity to present his constitutional claim, and also an opportunity to appeal any adverse ruling to the District Court pursuant to the provisions of Neb. Rev. Stat. § 83-1043 (Reissue 1976) and to the Nebraska Supreme Court pursuant to Neb. Rev. Stat. § 24-204 (Reissue 1979). At that time the court would be presented with properly framed issues and would have the advantage of a District Court ruling on the claim. As stated in *State ex rel. Nelson v. Butler*, 145 Neb. 638, 651, 17 N.W.2d 683, 691-92 (1945): "It is firmly established as the universal rule that a person 'may attack the constitutionality of a statute only when and so far as it is being or is about to be applied to his disadvantage; and to raise the question he must show that the alleged unconstitutional feature of the statute injures him and so operates as to deprive him of a constitutional right . . . .' [Citation omitted.] We have held that, 'A party to a suit will not ordinarily be permitted to attack the constitutionality of a statute in a case where his rights and interests are not invaded or affected by its provisions.' *State v. Brandt*, 83 Neb. 656, 120 N.W. 196."

For the above reasons, therefore, we conclude that the issue of the constitutionality of § 29-2920 cannot be considered in this appeal, and must be deferred at this time.

There being no other errors appearing in the record, the judgment and sentences of the District Court must be, and hereby are, affirmed.

AFFIRMED.

HELEN M. AHRENS AND ELDEN AHRENS, WIFE AND HUSBAND, APPELLEES, V. STEVEN K. DYE ET AL., APPELLANTS, IMPLEADED WITH KARL R. DYE ET AL., APPELLEES.

302 N.W.2d 682

Filed February 27, 1981. No. 42798.

1. **Tenants in Common.** Tenants in common can deal with third parties just as fully as owners of property held individually, including the right to terminate a lease as to the cotenant's interest.
2. ——. A nonleasing tenant in common who does not himself wish to cultivate the property may not prevent his cotenant's lessee from doing so.
3. **Unjust Enrichment.** A person is enriched if he has received a benefit, and he is unjustly enriched if the retention of the benefit would be unjust. Unjust enrichment of a person occurs when he has and retains money or benefits which in justice and equity belong to another.

Appeal from the District Court for Burt County: WALTER G. HUBER, Judge. Affirmed.

Roy I. Anderson and Gregory P. Drew for appellants.

David B. Latenser for appellees.

Heard before KRIVOSHA, C.J., BOSLAUGH, MCCOWN, CLINTON, BRODKEY, WHITE, and HASTINGS, JJ.

KRIVOSHA, C.J.

On June 10, 1980, this court released its opinion in the above-entitled matter, reported at 206 Neb. 423, 293 N.W.2d 388. That opinion was decided by a division of this court. Thereafter, a motion for rehearing was filed and we granted leave to reargue to the entire court. We have now concluded that the judgment of the trial court was correct, and we therefore withdraw our previous opinion and in place thereof file this opinion affirming the judgment of the trial court.

Though the facts of the action are set out in our earlier opinion, for ease of understanding we will repeat them herein. The property in question was originally owned by John A. Dye, who died testate on June 9, 1974. By the terms of his will, the property

descended as follows: a one-third interest to Helen M. Ahrens; a one-third interest to Karl R. Dye; a one-sixth interest to Steven K. Dye; and a one-sixth interest to David A. Dye. Following the death of John A. Dye, David A. Dye and Steven K. Dye and Steven's spouse, Deborah Dye, conveyed their interest in the real estate to Joan E. Siemonsma (Mrs. Siemonsma) and Steven K. Dye (Steven), mother and son, as joint tenants.

The land was leased by the owners to the husband of one of the joint owners, Elden Ahrens, on November 25, 1974. The agreement named Karl R. Dye, Helen M. Ahrens, David A. Dye, and Steven K. Dye as landlords and Elden Ahrens (Elden) as tenant. On August 29, 1977, Mrs. Siemonsma and Steven served a notice to quit on Elden and Helen Ahrens. Notwithstanding the notice to quit served by Mrs. Siemonsma and Steven on Elden, he nevertheless proceeded to plant a crop pursuant to the lease remaining in effect with the other co-owners.

Thereafter, an action in partition was filed; and on June 6, 1978, a decree was entered by the trial court ordering the land to be sold in partition. That decree specifically found that the notice to quit served by Mrs. Siemonsma and Steven on Elden terminated the landlord interest of Mrs. Siemonsma and Steven but did not terminate the landlord-tenant relationship of Helen Ahrens and Karl Dye to Elden.

Subsequently, the land was sold by the referee at a partition sale. Both the land and the growing crops were sold together and the purchaser was advised that it would acquire both the landlords' and tenant's interests in the land being sold.

In November of 1978 the owners of the property, other than Mrs. Siemonsma and Steven, filed an application for payment by the referee to Elden as tenant for the reasonable value of his services rendered as tenant in the production of crops which had been sold with the land. Mrs. Siemonsma and Steven

objected to the application and urged that their distributive shares of the proceeds be taken free and clear of any claim for compensation by the tenant for services or expenditures. They based their claim on the fact that they had terminated their relationship with the tenant.

On November 13, 1978, the court entered an order finding the value of the growing crops on the premises to have had a value at the time of the sale in the amount of $34,437.50. At the same time, however, the trial court found that Mrs. Siemonsma and Steven's objections should be sustained and ordered their shares to be received without any deduction for the costs of growing the crops. The referee was ordered to pay Elden as tenant the sum of $13,775, to be deducted from the distributive shares of Helen Ahrens and Karl Dye. This was apparently computed on the basis that the farm lease entitled Elden to 60 percent of the value of the crops. The trial court, however, found that Elden should only receive 60 percent of two-thirds of the value of the crops and that only two-thirds of the co-op bill should be paid from the proceeds of the sale, thereby imposing upon the tenant the cost of all the remaining costs without any corresponding right to the value of the crops. Likewise, Mrs. Siemonsma and Steven received an amount equal to one-third the value of the growing crops without paying for any of the costs of growing those crops.

Subsequently, appellees filed a motion for new trial. On January 2, 1979, the District Court sustained the motion for new trial and entered an amended judgment ordering the referee to pay to Elden for his services as tenant the sum of $20,662.50, to be deducted from the distributive shares of all of the former owners, including Mrs. Siemonsma and Steven. The trial court apparently concluded that Mrs. Siemonsma and Steven should not receive all of the benefits without incurring any expenses. The trial court thereafter overruled a motion for new trial. It was from that order which the appellants now appeal.

As noted in our earlier opinion, appellants raise several assignments of error. The principal issues concern Elden's relationship to the appellants and whether that relationship or some other doctrine entitles him to reimbursement from their distributive shares for his services and expenses.

It is true, generally speaking, that tenants in common can deal with third parties just as fully as owners of property held individually, including the right to terminate a lease as to the cotenant's interest. In 86 C.J.S. *Tenancy in Common* § 113(c) at 519-20 (1954) it is noted: "[O]ne tenant in common may terminate a lease as to his own interest without the concurrence of the other cotenants." The other side of that, however, as noted in the same work, is that: "A nonleasing tenant in common who does not himself wish to cultivate the property may not prevent his cotenant's lessee from doing so. . . ." § 113(e) at 521. While no cases in Nebraska may be found exactly on point, cases from other jurisdictions supporting the general rule that one cotenant may terminate a lease as to his own undivided interest in the property include *Cook v. Boehl*, 188 Md. 581, 53 A.2d 555 (1947); *Matteo v. Ginger Estates, Inc.*, 94 Misc. 2d 302, 404 N.Y.S.2d 533 (1978). See, also, 20 Am. Jur. 2d *Cotenancy and Joint Ownership* § 100 (1965). After the notice to quit was served on Elden, the court correctly concluded that Elden's tenancy as to those appellants' shares of the land was terminated. The notice to quit did not, however, operate to terminate the interest of landlord and tenant between Helen and Karl on the one hand, and Elden on the other.

Had the evidence disclosed that the land was sold subject to the tenant's rights in the crops, or at least not included in the sale as they were, perhaps the contentions of appellants would be correct. However, the evidence is uncontradicted that the land was sold with the tenant's rights. The evidence clearly establishes that the value of the crops at the time of the

sale was in the amount of $34,437.50. Presumably, whoever purchased the land paid an additional $34,437.50 by reason of the value of the crops and would not have paid that additional sum had the crops not been there. Mrs. Siemonsma and Steven therefore gained their proportionate shares of the $34,437.50 by reason of the unharvested crops being on the land and accepted the benefits resulting from the tenant's efforts. We believe, therefore, that the principle of unjust enrichment applies in a case of this nature, as apparently the trial court concluded. In 66 Am. Jur. 2d *Restitution and Implied Contracts* § 3 at 945 (1973), the author notes that unjust enrichment is "a general principle, underlying various legal doctrines and remedies, that one person should not be permitted unjustly to enrich himself at the expense of another, but should be required to make restitution of or for property or benefits received, retained, or appropriated where it is just and equitable that such restitution be made . . . . A person is enriched if he has received a benefit, and he is unjustly enriched if the retention of the benefit would be unjust. Unjust enrichment of a person occurs when he has and retains money or benefits which in justice and equity belong to another."

In *Bush v. Kramer*, 185 Neb. 1, 3, 173 N.W.2d 367, 369 (1969), we said: "Where benefits have been received and retained under such circumstances that it would be inequitable and unconscionable to permit the party receiving the benefits to avoid payment therefor, the law requires the party receiving and retaining the benefits to pay the reasonable value of them." See, also, Restatement of Restitution § 125 (1937).

In this case, Mrs. Siemonsma and Steven received one-third of the value of the growing crops as part of their distributive shares. They received that sum as a result of Elden's efforts in growing them and his incurring of expenses in connection with the crops. Should we permit them to keep it free of any charge, we, in effect, would be requiring Elden to have la-

bored for the benefit of Mrs. Siemonsma and Steven without any compensation and, in addition, be requiring Elden to absorb all the expenses of growing those crops. We believe that does, indeed, fall within the equitable doctrine of unjust enrichment and should not be permitted. The trial court correctly concluded that such was the case. We believe the judgment of the trial court was correct. The judgment is therefore affirmed.

AFFIRMED.

BOSLAUGH, J., dissenting in part.

I concur in the judgment of the court but dissent from that part of the opinion which holds that a tenant in common may terminate a lease as to his interest without the concurrence of the other tenants in common. I believe the rule is unsound and will lead to confusion and uncertainty in an area of the law where certainty is of utmost importance.

Although some authority may be found to support the rule stated in the majority opinion, *Cook v. Boehl*, 188 Md. 581, 53 A.2d 555 (1947), and *Matteo v. Ginger Estates, Inc.*, 94 Misc. 2d 302, 404 N.Y.S.2d 533 (1978), cited in the majority opinion, do not support the position taken. In the *Cook* case, the lessee's interest in the property was not affected by the notice of termination by one cotenant and the interests of the cotenants were determined after the partition of the property. The *Matteo* case involved the right of one tenant in common to maintain a holdover action without joining the other tenant in common. This is a well-established rule relating to joinder in such cases, but has no application in this case.

I believe the correct rule is expressed in the following statement in *Fredeking v. Grimmett*, 140 W. Va. 745, 762-63, 86 S.E.2d 554, 564 (1955), relating to termination of a lease by forfeiture: "A forfeiture provision in a contract of lease upon real estate owned jointly by tenants in common is indivisible and such lease can not

be forfeited by less than all the owners of the undivided interests for the reason that if the lease could be forfeited by less than all the owners of the undivided interests the lessee would be bound by the lease as to some of such owners and discharged as to other such owners. *Eurengy v. Equitable Realty Corporation*, 341 Mo. 341, 107 S.W.2d 68.

"In *Howard v. Manning*, 79 Okla. 165, 192 P. 358, 12 A.L.R. 819, the Court used this pertinent language:

"'If the right to enforce a forfeiture accrues and a part of the tenants in common are allowed to elect to enforce the forfeiture, then the lessee is placed in the inequitable position of being bound by the lease as to part of the tenants and discharged by a part, which means that the lessee is still liable as a lessee to some of the tenants in common, although he cannot enjoy any of the benefits of his lease without becoming a trespasser and liable for damages to the other owners of the land. A fair conception of honesty and fair dealing negatives a construction of the lease imputing to the lessor and lessee an understanding or intention that the lessee's covenants of the character involved in this case are subject to apportionment by the death of the lessor leaving more than one heir. If the death of the lessor operates to apportion the benefits of the covenant among his heirs, then there can be a partial forfeiture, leaving the lessee bound to part of the heirs but denied all practical benefits under the lease. This would create a sort of tenancy which, we believe, it would be unreasonable to hold that the lessor and lessee intended or contemplated.

"'Under the American authorities the lessee's covenants, unless expressed otherwise, are joint and indivisible under a lease executed jointly by all the tenants in common. The heirs of a deceased lessor are in no higher position with respect to the covenants in the lease than they would be if they jointly executed the same lease, although the lease may expressly reserve to each his proportionate interest in the rents.'"

See, also, 51C C.J.S. *Landlord & Tenant* § 103 (1968).

McCOWN, J., joins in this dissent.

NEBRASKA STATE BANK, A CORPORATION, APPELLEE, V. MARVEL L. GADDIS, APPELLANT.

302 N.W.2d 686

Filed February 27, 1981. No. 42994.

1. **Adverse Possession.** A claim of title to land by adverse possession must be proved by actual, open, exclusive, and continuous possession under claim of ownership for a full period of 10 years.
2. _____. Where one enters upon and takes possession of land of another under mistake as to the true boundary line, claiming the land as his own to a definite and certain boundary, he acquires title thereto by adverse possession by actual, open, exclusive, and continuous possession thereof under such claim for 10 years or more.
3. **Adverse Possession: Intent.** It is the visible and hostile possession, with an intention to possess land occupied under a belief that it belongs to the possessor, that constitutes its adverse character.
4. _____: _____. When a claimant occupies the land of another by actual, open, exclusive, and continuous possession, the owner is placed on notice that his ownership is endangered; and unless he takes proper action within 10 years to protect himself, he is barred from action thereafter and the title of the claimant is complete. It is the nature of the hostile possession that constitutes the warning, not the intent of the claimant when he takes possession.
5. **Equity: Appeal and Error.** The law requires this court in determining an appeal in an equity action involving questions of fact to reach an independent conclusion without reference to the findings of the District Court. In determining the weight of the evidence where there is an irreconcilable conflict on material issues of fact, this court will consider the fact that the trial court observed the witnesses and their manner of testifying.

Appeal from the District Court for Dakota County: FRANCIS J. KNEIFL, Judge. Reversed and remanded with directions.

Smith, Smith & Boyd for appellant.

Leamer Law Office for appellee.

Heard before KRIVOSHA, C.J., BOSLAUGH, MCCOWN, CLINTON, BRODKEY, WHITE, and HASTINGS, JJ.

MCCOWN, J.

Plaintiff's petition sought to quiet title to a 20-foot strip of land in or adjacent to South Sioux City, Nebraska. The defendant, by cross-petition, claimed title by adverse possession. The District Court, after trial, entered judgment quieting title to the land in the plaintiff. Defendant has appealed.

In 1955 defendant, Marvel L. Gaddis, and her husband purchased a residential property located on the north side of East 39th Street on the edge of South Sioux City, Nebraska. The property was conveyed by a metes and bounds description which conveyed a rectangular tract 295 feet north and south by 73 feet 8 inches east and west. The property to the east of the disputed strip was cultivated farmland. The disputed tract of land is a 20- x 295-foot strip of land located immediately east of the land described in defendant's deed.

At the time defendant and her husband purchased the property, they did not have it surveyed. On the south portion of the property there was a house facing East 39th Street surrounded by a yard with bushes and trees. At the north edge of the backyard a fence running east and west divided the north and south portions of the property. A gate at the east end of the fence was located on the disputed tract. A wire fence fastened to the trees and some iron posts ran from the east end of the gate to somewhere near the northeast corner of the disputed tract. There was also a snow fence which ran along the north boundary of the property. The area enclosed by the wire fence was used for horses. On the north portion of the property there was a horse barn, a flower garden, and some trees, referred to as an orchard, all of which were located partially on the Gaddis land and partially on the disputed strip. There was also a rock or refuse pile located on the disputed strip.

Near the east edge of the disputed strip there was a dropoff in level down to the farmland to the east. There was no fence, but the crop line of the farmland formed a boundary line between the two properties. The land was cultivated each year and the crop line did not vary over the years. None of the disputed strip was cultivated by the persons who farmed the cropland.

The defendant and her husband assumed that their property extended to the cropland to the east. The disputed tract was always maintained and used as an integral part of the Gaddis property. The lawn was mowed down over the dropoff, weeds were cut, and trees were trimmed and removed. No one except the defendant and her husband has used or had possession of the disputed strip since 1955.

In 1958 or 1959 the defendant and her husband placed a septic tank on the disputed strip in the area east of the house. The owner of the land to the east raised some question as to whether the tank encroached upon his property, but it was installed anyway without further action or protest and used and maintained continuously for more than 10 years thereafter. When the defendant and her husband separated in 1973 the horse barn and the wire fence on the north portion of the property were removed.

In 1972 Town and Country Realty Company acquired title to the agricultural land to the east of the Gaddis property. Sometime shortly after Town and Country Realty acquired that land the telephone company became interested in purchasing a portion of the agricultural area and had a survey made which revealed that the 20-foot strip involved here was occupied by the defendant. As a result, the telephone company purchased the agricultural real estate to the east of the Gaddis property except for the disputed 20-foot strip. In November 1977 Town and Country Realty Company conveyed the disputed 20-foot strip to the plaintiff by quitclaim deed for $200. Town and Country never had or claimed possession of the disputed tract.

In 1974 the defendant and her husband were divorced. The decree assigned the residential property to the defendant and the description in the decree was the same as the description contained in the 1955 deed to the defendant and her husband. Thereafter, the State of Nebraska, in a condemnation proceeding necessitated by the widening of 39th Street, acquired a few feet of land from the owners of the property along the north side of East 39th Street. The defendant received payment for the 73 feet 8 inches shown on her deed and Town and Country Realty received payment for the few feet on the south end of the disputed strip. Neither the defendant nor her husband has ever paid taxes on the disputed strip.

The District Court found that defendant's estranged husband testified that he never intended to occupy more land than was purchased in 1955; that no open claim was made to the disputed tract by the defendant prior to the plaintiff's contractor entering upon the property in 1978; and that the record was devoid of any evidence tending to prove that the defendant at any time since 1955 possessed the disputed tract adversely, exclusively, notoriously, or actually. The District Court entered judgment against the defendant on defendant's cross-petition and quieted title to the disputed strip in the plaintiff.

It is well settled in this state that one who claims title by adverse possession must prove by a preponderance of the evidence that he has been in actual, continuous, exclusive, notorious, and adverse possession under claim of ownership for a full period of 10 years. *Layher v. Dove*, 207 Neb. 736, 301 N.W.2d 90 (1981).

The plaintiff contends, and the trial court found, that the defendant's possession of the property involved here was not adverse because defendant and her husband conceded that they did not intend to claim more property than they had purchased. Plaintiff argues that their possession was therefore not under claim of ownership.

This case is a classic case of a mistaken boundary line. This court has consistently held that a claim of adverse possession is founded upon the intent with which the occupant had held possession and that this intent is ordinarily determined by what he has done in respect thereto. In *Purdum v. Sherman*, 163 Neb. 889, 81 N.W.2d 331 (1957), we said: "The fact that one claiming title by adverse possession never intended to claim more land than is called for in his deed is not a controlling factor. It is the intent with which possession is held rather than an intention to hold in accordance with his deed that is controlling. . . . '[T]he possession is the important element, and it is held that such possession is not the less adverse because the person takes possession of the land in question innocently and through mistake. In other words, it is the visible and adverse possession, with an intention to possess land occupied under a belief that it is the possessor's own, that constitutes its adverse character, and not the remote view or belief of the possessor.'" *Id.* at 893-94, 81 N.W.2d at 334-35.

In an adverse possession case, intent may be either actual or implied or inferred from the circumstances. In most cases it is inferred from the circumstances. Actual assertion of claim of ownership is not necessary. *Svoboda v. Johnson*, 204 Neb. 57, 281 N.W.2d 892 (1979).

In *Pettis v. Lozier*, 205 Neb. 802, 290 N.W.2d 215 (1980), this court held that adverse possession is founded upon the intent with which the occupant held possession and can best be determined by his acts. We said: "'It is the nature of the hostile possession that constitutes the warning, not the intent of the claimant when he takes possession. When, therefore, a claimant occupies the land of another by actual, open, exclusive, and continuous possession, the owner is placed on notice that his ownership is endangered and unless he takes proper action within 10 years to protect himself, he is barred from action there-

after and the title of the claimant is complete.'" *Id.* at 805, 290 N.W.2d at 217.

The record in the case now before us establishes that the defendant and her husband appropriated and used the disputed strip as their own, to the exclusion of all others. Their acts establish their intent and a claim of ownership which was adverse to the plaintiff. Adverse possession does not depend upon the remote motivations or purposes of the occupant nor upon whether his motivation is guilty or innocent. The evidence is uncontradicted that no one ever interfered with defendant's open, exclusive, and continuous possession and use of the disputed strip from 1955 until the plaintiff's contractor attempted to enter on the property in 1978.

The law requires this court in determining an appeal in an equity action involving questions of fact to reach an independent conclusion without reference to the findings of the District Court. In determining the weight of the evidence where there is an irreconcilable conflict on material issues of fact, this court will consider the fact that the trial court observed the witnesses and their manner of testifying. *Svoboda v. Johnson, supra.* In the case at bar, the evidence is essentially uncontradicted and is not in conflict on any material issue.

In our view the evidence established that the defendant was in actual, continuous, exclusive, notorious, and adverse possession of the disputed strip under a claim of ownership for a full period of 10 years. The judgment of the trial court is reversed and the cause remanded with instructions to enter judgment for the defendant on her cross-petition.

REVERSED AND REMANDED WITH DIRECTIONS.

RIESCHICK DRILLING COMPANY, A PARTNERSHIP, APPELLANT AND CROSS-APPELLEE, V. AMERICAN CASUALTY COMPANY, A PENNSYLVANIA CORPORATION, ET AL., APPELLEES AND CROSS-APPELLANTS.

303 N.W.2d 264

Filed February 27, 1981. No. 43013.

1. **Judgments: Appeal and Error.** The judgment of the trial court in an action at law where a jury has been waived has the effect of a verdict of a jury and will not be set aside unless clearly wrong. In determining the sufficiency of the evidence to sustain a judgment in a law action, it must be considered most favorably to the successful party, and every controverted fact must be resolved in that party's favor, and such party must have the benefit of any inferences reasonably deducible from it.
2. **Pleadings: Appeal and Error.** Where a certain theory has been adopted and relied upon by the parties during the trial, such theory will be adhered to on appeal regardless of whether it is correct.
3. ____: ____. On appeal to this court, a case will be considered upon the theory upon which the case was tried below, even though not pleaded, where the parties have acquiesced in the theory and the case was submitted to the trial court on that basis.
4. **Contractors and Subcontractors: Contracts: Notice.** Any person having direct contractual relationship with a subcontractor but no contractual relationship, express or implied, with the contractor furnishing such bond shall have a right of action upon the bond upon giving written notice to the contractor within 4 months from the date on which such person did or performed the last of the labor, or furnished or supplied the last of the material for which such claim is made, stating with substantial accuracy the amount claimed and the name of the party to whom the material was furnished or supplied or for whom the labor was done or performed. Neb. Rev. Stat. § 52-118.01 (Reissue 1978).
5. **Contractors and Subcontractors: Proof.** There being no specific standard by which reasonable value of labor and materials furnished shall be proved, prima facie proof thereof is made where a reasonable inference of such value flows from the evidence adduced.
6. **Insurance: Contracts: Attorney Fees.** In all cases where the beneficiary, or other person entitled thereto, brings an action upon any type of insurance policy except workmen's compensation insurance, or upon any certificate issued by a fraternal beneficiary association, against any company, person, or association doing business in this state, the court, upon rendering judgment against such company, person, or association, shall allow the plaintiff a reasonable sum as an attorney fee in addition to the amount of his recovery, to be taxed as part of the costs. Neb. Rev. Stat. § 44-359 (Reissue 1978).

7. **Attorney Fees.** The amount of attorney fees to be allowed under Neb. Rev. Stat. § 44-359 (Reissue 1978) rests in the sound discretion of the court.

Appeal from the District Court for Otoe County: RAYMOND J. CASE, Judge. Affirmed as modified, and remanded with directions.

Richard L. Halbert for appellant.

Lyle E. Strom of Fitzgerald, Brown, Leahy, Strom, Schorr & Barmettler for appellee Rogers.

Robert J. Huck of Croker & Huck for appellees except Rogers.

Heard before KRIVOSHA, C.J., BOSLAUGH, MCCOWN, BRODKEY, and WHITE, JJ., and COLWELL, District Judge.

BRODKEY, J.

Plaintiff, Rieschick Drilling Company (Rieschick), which was engaged in the business of drilling wells, appeals to this court from a judgment entered in the District Court of Otoe County in an action brought by Rieschick against the defendants, Charles J. Rogers Construction Company (Rogers), a subcontractor, and against Darin & Armstrong, Inc., the general contractor, and also against American Casualty Company and National Fire Insurance Company, the bonding companies for the general contractor. In its action in District Court, Rieschick sought to recover the reasonable value of well-drilling labor, materials, and equipment furnished pursuant to alleged oral requests by Rogers, the subcontractor; and also sought in the same action to recover against the bonding companies under Neb. Rev. Stat. § 52-118.01 (Reissue 1978), and to recover an attorney fee under Neb. Rev. Stat. § 44-359 (Reissue 1978). Defendant Darin & Armstrong, Inc., the general contractor, was dismissed from the action prior to trial, and no error is assigned in this appeal with regard to such dismissal.

Trial was had to the court, sitting without a jury, in the District Court of Otoe County, following which the court entered judgment for Rieschick in the amount of $13,547.19 and court costs. The trial court did not award Rieschick attorney fees in this action. The principal issues raised in this appeal are whether the trial court erred in its assessment of its award to Rieschick and whether it erred in failing to award Rieschick attorney fees pursuant to the aforementioned statute, § 44-359. Rogers has cross-appealed, alleging that the work and materials performed and supplied by Rieschick were within the scope of its original contract with Rieschick; and Rogers prayed for the dismissal of Rieschick's petition and also for judgment on its counterclaim against Rieschick for the amount of $4,831.78 and costs, in which counterclaim it sought to recover the value of labor performed by Rogers' employees in assisting Rieschick in performing its contract.

The facts in this case reveal that Rogers, a Michigan corporation, was generally engaged in underground excavation and foundation construction, and entered into a subcontract in the spring of 1976 to do the excavation and drainage work required in connection with the construction of a coal power plant near Nebraska City. The contract between Rogers and the general contractor, Darin & Armstrong, Inc., required that a 70- x 90-foot area be excavated and dewatered so that the power plant thrust block, a massive concrete foundation, could be constructed. The plans on the project called for the thrust block to be installed at an elevation of 893.5 feet above sea level. The location of the site where the excavation was to take place had a ground surface elevation of approximately 916 feet and a water table average of 906 feet. The water table average would fluctuate because of the project's proximity to the Missouri River and also because of seasonal precipitation. The project required that the excavation site be dewatered to a level

of 890 feet to provide that the bottom of the thrust block area would be dry for the pouring and curing of the cement foundation. As Rogers did not generally engage in dewatering excavation sites, the company "put out a call" for dewatering bids in March of 1976.

In response to this call, Rogers received three bids. The first was from Layne-Western Company in the sum of $14,160 and provided for the drilling of two wells and the installation of two 40-horsepower well pumps which would dewater the excavation area to the 890-foot level. The second bid, from Stang Hydronics, Inc., was in the sum of $12,000 for the installation of wells, plus the rental sum of $1,900 per month to operate the water pumps and discharge pipes. This bid also recited that Stang Hydronics would bring the water table down to the 890-foot level. After receipt of these bids, Rogers contacted Rieschick Drilling, a partnership in Falls City, Nebraska, which is operated by Roy Rieschick and his mother, Carol Rieschick. It appears that this contact was made by Rogers because Rieschick drilled an average of 50 wells a year and was familiar with the water table in the Nebraska City area. Roy Rieschick examined the excavation site and submitted a bid of $12,240 on April 6, 1976. The Rieschick bid called for the installation of four wells and four 6-inch submersible pumps, and included the statement: "This bid is for completed well & pump installed & completely owned by C. J. Rogers. Any overtime or extra cost is billed to C. J. Rogers."

Rogers accepted this bid by issuing a purchase order the same day, and installation of the well and pump system began on April 10, 1976. This installation, however, proved inadequate and the pumps failed to lower the water table to the required 890-foot level. Rieschick then advised Rogers that it would use two 8-inch well pumps to complete the dewatering project. To avoid further delay in the construction of the power plant, Rogers informed Rieschick to proceed, relying upon Rieschick's expertise. The 8-inch pumps were

installed in May of 1976, but, notwithstanding, were not adequate to lower the water table to the required level. It finally appears that in June of 1976 Rieschick rented a well point water pump system and installed it at the excavation site. This system, together with the other pumps, was able to keep the water level down so that the installation of the thrust block could proceed. The record indicates that Rieschick presented Rogers with statements totaling $28,854.42 for labor and materials furnished in connection with the installation of the two 8-inch water pump systems. This amount did not include the rental of the well point system, which was subsequently paid to Rieschick. When Rieschick threatened to remove the well point pump system unless Rogers' supervisor signed the invoices, indicating approval, the supervisor signed the invoices, but with the notation that, while the work had been done, there was no agreement about payment or the prices charged for the labor and materials provided. Upon completion of the project, it appears that Rogers attempted to return the 8-inch pumps to Rieschick, which refused to accept them, contending that the pumps became the property of Rogers. These pumps were subsequently removed by Rogers when it completed its work in January of 1977, and have been stored at Rogers' offices in Michigan since that time as the property of Rieschick.

This matter came to trial before the District Court of Otoe County on April 25, 1979, and May 16, 1979, a jury having been waived by all of the parties. The court found that the original contract of April 6, 1976, required Rieschick to design and install a dewatering system which would lower the water table at the thrust block site to 890 feet. The court further found that Rieschick's installation was unsuccessful and inadequate in lowering the water table to the contracted level. In its memorandum opinion, filed August 8, 1979, the trial court stated:

"An issue has arisen as to whether the plaintiff was

bound by his original bid to lower the water table to the 890 foot level or whether the contract was changed at this point.

"For the purpose of this litigation, the Court determines that the contract requirements were changed by Rogers and subsequently became an oral contract. The installation of the two 8-inch pumps failed to lower the table to the desired level once again. And at this time the plaintiff suggested installation of a well point system to dewater in the thrust block area. A series of interconnected well points were sunk in the thrust block area and proved successful in dewatering to the desired level together with the submersibles which had already been installed.

"The defendant Rogers paid a total of $14,089.12 which included the original contract price together with those items appearing at Exhibit 30 [materials required to drill and install the initial wells and 6-inch pumps] and an additional $3700.00 for the rental of the well point system which the plaintiff had procured through Stang Hydronics.

"The Court here finds the basic law to be that a contractor may recover the reasonable value of extra work which is necessary because of material changes made in the contract at the request of the owner. The plaintiff's evidence on many of the items termed extras is too sparse to meet the requirement of a preponderance of the evidence.

"The Court finds that recovery here must rest upon a quantum meruit and is limited to additional costs incurred which are proven to have been performed under authorization from Rogers.

"Under any quantum meruit theory, it is the Court's opinion that the law demands adequate proofs that the charges made were fair and reasonable. With respect to the two 8-inch pumps, the Court has looked for evidence and failed to find any which would indicate that Rogers was to purchase the pumps and the $10,412.52 for the sale of the pumps is disallowed

in the Court's analysis, the pumps themselves to be the property of the plaintiff and to be returned to the plaintiff with the costs of shipping to be paid by the plaintiff.

"In an analysis of the evidence, it is believed that the following items are supported therein and that evidence is sufficient to preponderate on a quantum meruit basis:

Truck Rental:	$ 304.80
Labor: Regular - $1747.20	
Overtime - 1094.37	2841.57
Payments to Union for health & welfare and pension:	400.00
Fittings, parts & equipment:	6311.12
Fittings, parts & equipment:	368.70
Rental charge on drilling rig:	3321.00
	$13547.19

"The parties in their presentation to the Court have submitted this under the claim 'extras' and not as a part of the contract of April 6, 1976. The Court is treating it in the same manner. It is the intention of the Court that the figure in the judgment not overlap any of the items paid under the contract of April 6th or the $3700.00 paid as rental payment on the dewatering system." (Emphasis supplied.)

We note at the outset that the trial court entered judgment "against the defendants and each of them." Darin & Armstrong, Inc., the general contractor, was a named defendant in the lawsuit as originally filed. However, as previously mentioned, it was dismissed from the lawsuit on its motion prior to the trial of this action. Therefore, insofar as the judgment of the trial court might be interpreted as also being a judgment against Darin & Armstrong, it would obviously be incorrect; and the reference in the court's memorandum opinion to the effect that Rogers was a subcontractor to Darin & Armstrong, with no other findings as to the liability of Darin & Armstrong, would not be sufficient to constitute a judgment against Darin &

Armstrong, or render it liable thereunder. To clarify any possible misunderstanding in this regard, we find that the judgment entered by the trial court in this case does not constitute a judgment against Darin & Armstrong, and the assignment of error contained in the brief of appellees and cross-appellants (except Rogers) to the effect that the court erred in awarding judgment against Darin & Armstrong, Inc., because of its previous dismissal by the court as a party to the action, is correct, and the record should be corrected to reflect that fact.

The general rule which controls our review of this matter in this case is that the judgment of the trial court in an action at law where a jury has been waived has the effect of a verdict of a jury and will not be set aside unless clearly wrong. In determining the sufficiency of the evidence to sustain a judgment in a law action, it must be considered most favorably to the successful party, and every controverted fact must be resolved in that party's favor, and such party must have the benefit of any inferences reasonably deducible from it. *Knight Bros., Inc. v. State*, 189 Neb. 64, 199 N.W.2d 720 (1972). In such case, the verdict will not be disturbed on appeal unless clearly wrong. *Brandt v. Mayer*, 196 Neb. 751, 246 N.W.2d 203 (1976); *Siefford v. Housing Authority*, 192 Neb. 643, 223 N.W.2d 816 (1974); *Farmer's Union Co-op Company of Mead v. Flamme Brothers*, 196 Neb. 699, 245 N.W.2d 464 (1976).

As stated above, the bid submitted by Rieschick contains the language: "This bid is for completed well & pump installed & completely owned by C. J. Rogers. Any overtime or extra cost is billed to C. J. Rogers." It is undisputed that Rieschick received full payment as per the terms of its original contract, as well as payment for certain additional items as set out in exhibit 30, representing extra costs incurred in the installation of the original 6-inch pumps referred to. A review of the record in this case convinces us that

the action for the recovery of value of labor and materials not contemplated by the original contract was based upon the theory of such items clearly being "extras," and recovery therefor was allowed by the court on a quantum meruit basis. The case was tried on that theory by the parties, and the court so found in its judgment. The rule is well established in Nebraska that where a certain theory has been adopted and relied upon by the parties during the trial, such theory will be adhered to on appeal regardless of whether it is correct. *Reeves v. Associates Financial Services Co., Inc.*, 197 Neb. 107, 247 N.W.2d 434 (1976); *Bohmont v. Moore*, 141 Neb. 91, 2 N.W.2d 599 (1942). We have also held that on appeal a case will be considered upon the theory upon which the case was tried below, even though not pleaded, where the parties have acquiesced in the theory and the case was submitted to the trial court on that basis. *Timmerman v. Hertz*, 195 Neb. 237, 238 N.W.2d 220 (1976). In *Meyer v. Moell*, 186 Neb. 397, 183 N.W.2d 480 (1971), we held that a party will not be permitted to change his theory on appeal. In the trial court's memorandum, accompanying its judgment entry, the court stated: "The parties in their presentation to the Court have submitted this under the claim of 'extras' and not as a part of the contract of April 6, 1976. The Court is treating it in the same manner." Under the rule stated above, we shall likewise do so. The court rendered judgment in favor of Rieschick for $13,547.19 for the items it found from the evidence constituted "extras" as set out in its memorandum opinion. We conclude there is evidence to support the court's findings in this regard, and that the court was not clearly wrong in so finding.

In this connection we discuss certain specific errors claimed by Rieschick in this regard. In its amended petition, Rieschick originally prayed for judgment in the amount of $42,230.57 with interest, costs, and attorney fees. The court awarded Rieschick judgment

in the sum of $13,547.19. The court also found that Rieschick's evidence on many of the items termed extras was too sparse to meet the requirement of a preponderance of the evidence. Rieschick has admitted that all the extra work incurred in the installation of the original pump system has been paid for by Rogers. With reference to the ownership of the two 8-inch submersible pumps, or the liability for payment to Rieschick for the value thereof, the court found that there was no support for Rieschick's contention that Rogers would own the pumps at the termination of the dewatering project. William Leoni, the president of Rogers, testified that no one at Rogers ever agreed to pay for the pumps. We conclude that the finding by the trial court that Rieschick had failed to prove that such pumps were to be owned by Rogers was not clearly erroneous, and that the pumps are being held for the benefit of Rieschick and subject to its disposition.

Rieschick also contends that there is due it the sum of $4,226 for costs of repairs to a mud pump. The court disallowed this item on the grounds that there was no evidence to show what repairs were actually performed on the mud pump or what the actual costs were in that regard.

Rieschick also claims that Rogers did not pay for the rental on the well point system in the amount of $3,700. The evidence reveals that Mr. Leoni, the president of Rogers, agreed to reimburse Rieschick for the costs of renting the well point system. The trial court found that Rogers had paid the $3,700, and specifically found that the award of $13,547.19 to Rieschick in the court's judgment should not overlap any of the extras Rogers had already paid for, or the $3,700 rental fee paid as rental payment on the dewatering system. The court was not clearly wrong on this item.

Defendant bonding companies contend that even if some of the judgment of the District Court is affirmed, there can be no judgment against Darin & Armstrong because that company was dismissed prior to trial.

We have previously agreed with that contention. They also contend, however, there can be no judgment against the bonding companies because there was no direct contract or dealings between Rieschick and the general contractor, Darin & Armstrong, and also because no proper statutory notice was given under § 52-118.01. With respect to the first contention, we note that that statute provides that "any person having direct contractual relationship with a subcontractor but no contractual relationship, express or implied, with the contractor furnishing such bond shall have a right of action upon the bond upon giving written notice to the contractor within four months from the date on which such person did or performed the *last of the labor*, or furnished or supplied the *last of the material* for which such claim is made, stating with substantial accuracy the amount claimed and the name of the party to whom the material was furnished or supplied or for whom the labor was done or performed." (Emphasis supplied.) In this case, although there was no contractual relationship between Darin & Armstrong and Rieschick, there were clearly direct dealings between the subcontractor, Rogers, and Rieschick. In this connection see *McElhose v. Universal Surety Co.*, 182 Neb. 847, 158 N.W.2d 228 (1968). The bonding companies also contend that notice, to be effective under the above statute, must be given with respect to every separate invoice submitted by Rieschick during the course of the performance or construction of the project. We do not believe this contention is supported by the language of the statute itself which provides for "a right of action upon the bond upon giving written notice to the contractor within four months from the date on which such person did or performed the *last of the labor*, or furnished or supplied the *last of the material* for which such claim is made . . . ." (Emphasis supplied.) We conclude that the District Court did not err in entering judgment not only against Rogers on quantum meruit but also

against the bonding companies on the statutory remedy on the bonds as provided under § 52-118.01.

Appellees also contend that there was insufficient evidence to establish the value of some of the materials and services involved in this appeal, and that mere invoices or statements showing the cost of such materials and services are insufficient to establish the fair and reasonable value thereof. While it may possibly be true that specific evidence of reasonable value was lacking with regard to some of the items for which an award was made, we do not believe this fact is necessarily determinative of Rieschick's right to recover for such items. In *Ritzau v. Wiebe Constr. Co.*, 191 Neb. 92, 97, 214 N.W.2d 244, 247-48 (1974), this court stated: "'There being no specific standard by which reasonable value of labor and materials furnished shall be proved, prima facie proof thereof is made where a reasonable inference of such value flows from the evidence adduced.'" We believe the court was not clearly wrong in determining the reasonable value of the items for which it awarded judgment under the evidence before it in the record.

Finally, we turn to what is probably Rieschick's main assignment of error in its appeal to this court, to wit, that the trial court erred in failing to award attorney fees pursuant to § 44-359. We note that it has, in its brief on appeal, placed this assignment at the top of its list of alleged errors. As previously stated, the trial court did not award Rieschick attorney fees in this action, although it did hold a separate hearing to consider the matter following the entry of the judgment itself. We believe the trial court erred in this determination and that Rieschick is entitled to an award of attorney fees under § 44-359, which reads in part as follows: "In all cases where the beneficiary, or other person entitled thereto, brings an action upon any type of insurance policy except workmen's compensation insurance, or upon any certificate issued by a fraternal beneficiary association, against any

company, person or association doing business in this state, the court, upon rendering judgment against such company, person or association, *shall* allow the plaintiff a reasonable sum as an attorney's fee in addition to the amount of his recovery, to be taxed as part of the costs." (Emphasis supplied.)

It is clear in this case that Rieschick did sue the bonding companies of the principal contractor, and recovered judgment against them. This court has previously held that the foregoing section is applicable to actions on performance bonds. *Omaha Home for Boys v. Stitt Constr. Co., Inc.*, 195 Neb. 422, 238 N.W.2d 470 (1976). See, also, *Reorganized Church of Jesus Christ v. Universal Surety Co.*, 177 Neb. 60, 128 N.W.2d 361 (1964). We have also held that the provision of § 44-359 with relation to the allowance of attorney fees is mandatory. *State ex rel. School Dist. v. Ellis*, 160 Neb. 400, 70 N.W.2d 320 (1955); *Dale Electronics, Inc. v. Federal Ins. Co.*, 205 Neb. 115, 286 N.W.2d 437 (1979). The amount of such fees to be allowed under the foregoing statute rests in the sound discretion of the court. *Herrera v. American Standard Ins. Co.*, 203 Neb. 477, 279 N.W.2d 140 (1979); *Stephens v. Allied Mut. Ins. Co.*, 182 Neb. 562, 156 N.W.2d 133 (1968).

In view of what we have stated above, we conclude that the judgment of the District Court of Otoe County must be affirmed, but modified to exclude the application of such judgment to Darin & Armstrong, the principal contractor. We also remand the case to the District Court with directions to hold a hearing to determine the fair and reasonable amount of attorney fees to be awarded to Rieschick.

AFFIRMED AS MODIFIED, AND REMANDED WITH DIRECTIONS.

VIVIAN WATLEY, APPELLEE, V. ORLIN WATLEY, APPELLANT.

302 N.W.2d 690

Filed February 27, 1981. No. 43101.

Alimony: Judgments. An unqualified allowance of alimony in gross made before July 6, 1972, whether payable immediately in full or periodically in installments, and whether intended solely as a property settlement or as an allowance for support, or both, is not subject to modification.

Appeal from the District Court for Adams County: BERNARD SPRAGUE, Judge. Affirmed.

Law Offices of Kenneth Cobb, P.C., for appellant.

David B. Downing for appellee.

Heard before BOSLAUGH, BRODKEY, and WHITE, JJ., and CASE and GARDEN, District Judges.

GARDEN, District Judge.

This case involves a petition to modify a divorce decree. The plaintiff, Vivian Watley (now Merrill), was divorced from the defendant, Orlin Watley, in 1972. The written stipulation of the parties provided in part as follows:

"8. The defendant agrees to pay the plaintiff the sum of $1,000.00 on or before the 10th day of July, 1972, and $1,000.00 on or before the 10th day of each month thereafter, for a total of 20 years, or 240 months.

"9. The defendant agrees that to secure the payments specified in paragraph 8. above, he will continue to maintain his present life insurance program, consisting of the following, to-wit:

Policy # V-8093276	$ 1,000.00
Policy # V-818-9888	2,000.00
Policy # 224893	10,000.00
Policy # 5682877	35,000.00
Policy # 60499136	42,450.00
Total Face Value	$90,450.00

"Defendant further agrees that he will exhibit these

policies to plaintiff at any reasonable time and he will further cause the issuing company or companies to prepare proper forms to be executed by the defendant which will provide, in effect, that the defendant shall not change the beneficiary of said life insurance policies without the written consent of the plaintiff. At such time as all 240 payments have been made, the plaintiff's claim or lien or interest in these said life insurance policies shall cease to exist and shall be released by the plaintiff to any insurance company if requested to do so. The defendant further agrees that so long as any payments shall remain due under paragraph 8. above, he will not pledge, mortgage, assign or in any way encumber the life insurance policies referred to herein.

"Defendant further agrees as additional security for the payment of the provisions in paragraph 8., not to do anything of his own act to diminish the value of the assets of his estate, including his stock in Ag-Tronic, Inc.

"10. In the event the plaintiff has remarried at the time of her death and payments are still due under paragraph 8. above, then no further obligation for payment shall exist and the judgment will be fully satisfied. In the event of the plaintiff's death and she has not remarried, then all payments due from the defendant, as set forth in paragraph 8. above, shall be payable equally to the two (2) sons of the parties hereto in the same manner and at the same rate as contained in the said paragraph 8."

The divorce decree entered on June 30, 1972, provided in part:

"8. The court further finds that the defendant should pay to the plaintiff the sum of $1,000.00 per month, commencing with the month of July, 1972, for a total of 240 months, and the Court further approves the security arrangements for these said payments, as set forth in detail in the Stipulation.

"9. The Court approves the division of property in all

respects, as set forth in detail in the said Stipulation of the parties."

The plaintiff married Harvey Merrill on July 5, 1975. The defendant filed a petition for modification on December 18, 1975, alleging the marriage of plaintiff to Harvey Merrill; that Harvey Merrill is able to provide for the needs of the plaintiff in at least as good a manner as that to which she was accustomed prior to the divorce; that it is not necessary for her support or maintenance that she receive the sum of $1,000 per month from the defendant; that it will operate as a gross injustice to the defendant to continue paying said sum during the marriage of the plaintiff to Harvey Merrill; and prayed that the decree be modified.

Thereafter, the plaintiff filed a petition for modification, alleging that her needs had materially increased; that the ability of the defendant to pay had materially increased since the date of the decree; and prayed for a modification of the decree to increase her monthly payment to $2,000 per month for the balance of the 20-year period originally specified.

Issues were joined and trial was had to the court, resulting in the dismissal of both petitions for modification. The defendant filed a motion for new trial, which was overruled, and perfected his appeal. We affirm the judgment of the District Court in dismissing defendant's petition for modification.

The defendant argues that he should no longer be required to pay alimony pursuant to the decree because of the plaintiff's remarriage. The defendant urges us to apply the provisions of Neb. Rev. Stat. § 42-365 (Reissue 1978) to this case and to terminate the alimony.

The alimony award in the June 30, 1972, divorce decree was an award of alimony in gross. It was unqualified. While it is true that paragraph 10 of the stipulation of the parties provided for termination of the monthly payments upon the death of the plaintiff after remarriage, no such provision was made in the decree that it should terminate upon death or re-

marriage of the recipient. Prior to the enactment of Neb. Rev. Stat. § 42-366 (Reissue 1978), the effective date of which was July 6, 1972, the law was clear regarding the effect of stipulations concerning property settlement and alimony. "Courts may approve property and alimony settlements made between the parties, when a divorce is granted, if it finds the same to be fair and equitable. However, when the court in its decree determines and fixes the amount of alimony and no appeal is taken therefrom, the effect of the stipulation, so far as the decree is concerned, is that it was taken merely as advisory to the court and the terms fixed by the decree are controlling." *Dunlap v. Dunlap*, 145 Neb. 735, 739, 18 N.W.2d 51, 53 (1945); *Coker v. Coker*, 173 Neb. 361, 113 N.W.2d 329 (1962). We therefore view the case from the standpoint of the provisions of the decree.

The law here is clear. "'An unqualified allowance of alimony in gross made before July 6, 1972, whether payable immediately in full or periodically in installments, and whether intended solely as a property settlement or as an allowance for support, or both, is not subject to modification.'" *Kasper v. Kasper*, 195 Neb. 754, 755, 240 N.W.2d 591 (1976); *Bryant v. Bryant*, 191 Neb. 539, 216 N.W.2d 162 (1974). See, also, *Karrer v. Karrer*, 190 Neb. 610, 211 N.W.2d 116 (1973); *Ziegenbein v. Damme*, 138 Neb. 320, 292 N.W. 921 (1940). The facts of this case fall clearly within the above-cited authorities. There is no merit to defendant's contention.

The judgment of the District Court is correct and is affirmed.

AFFIRMED.

J. C. DAUGHERTY, APPELLEE, V. ASHTON FEED AND GRAIN CO., INC., A NEBRASKA CORPORATION, APPELLANT.

303 N.W.2d 64

Filed February 27, 1981. No. 43171.

1. **Injunction: Appeal and Error.** An action for a permanent injunction is heard de novo on appeal. Where an action in equity is appealed, it is the duty of this court to try the issues de novo and to reach an independent conclusion without reference to the findings of the District Court.
2. **Injunction: Nuisances.** An injunction against a nuisance is an extraordinary remedial process which is granted not as a matter of right but in the exercise of the sound discretion of the court, to be determined on a consideration of all the circumstances of each case.
3. **Nuisances.** Generally, noise is not a nuisance per se, but it may be of such a character as to constitute a nuisance in fact, which may serve as the basis of an action at law or in equity, even though it arises from the operation of a factory, industrial plant, or other lawful business or occupation.
4. ____ Whether noise is sufficient to constitute a nuisance depends upon its effect upon an ordinary reasonable man, that is, a normal person of ordinary habits and sensibilities. Relief cannot be based solely upon the subjective likes and dislikes of a particular plaintiff, and relief must be based upon an objective standard of reasonableness.
5. ____ To justify abatement of a claimed nuisance, the annoyance must be such as to cause actual physical discomfort to one of ordinary sensibilities. There is a presumption, in the absence of evidence to the contrary, that a plaintiff in an action for abatement of a nuisance has ordinary sensibilities.
6. **Pleadings: Equity.** A prayer for general equitable relief is to be construed liberally, and will often justify granting relief in addition to that contained in the specific prayer, provided it fairly conforms to the case made by the petition and the evidence.
7. **Jurisdiction: Equity.** A court of equity which has obtained jurisdiction for any purpose may retain jurisdiction for the purpose of administering complete relief between the parties with respect to the subject matter.

Appeal from the District Court for Sherman County: DEWAYNE WOLF, Judge. Affirmed.

Perry, Perry, Witthoff & Guthery for appellant.

Norman E. Stephens & Donald R. Janousek for appellee.

Heard before KRIVOSHA, C.J., BOSLAUGH, MCCOWN, CLINTON, BRODKEY, WHITE, and HASTINGS, JJ.

BRODKEY, J.

Ashton Feed and Grain Co., Inc., (Ashton Feed), the defendant below, appeals to this court from a permanant injunction entered on November 16, 1979, by the District Court of Sherman County, Nebraska, restraining it from operating certain fans and dryers in connection with its feed and grain storage business. The action seeking the injunction against Ashton Feed was brought by J. C. Daugherty, the appellee herein, who is the owner and resident of an 8-acre tract adjacent to the land upon which the business of Ashton Feed is located in rural Ashton, Nebraska. The record indicates that the appellee and his family have resided on their property since 1974. John Beall, president of Ashton Feed, stated that he acquired the grain elevator in Ashton in February of 1978, at which time it had a grain storage capacity of 175,000 bushels. Improvements were subsequently made to the facilities that year, which included the addition of twelve 55,000-gallon storage bins that increased the grain storage capacity of the elevator to over 800,000 bushels of grain. It also appears that two aeration fans were attached to each of the 12 bins for the purpose of controlling the moisture content in the bin in order to preserve the grain.

On October 24, 1978, Daugherty filed a "Petition for Temporary Restraining Order," with the District Court. In his petition, the appellee alleged: "5.0 That the Defendant has carried on, is still carrying on and threatens to continue carrying on the drying of the grain stored in the said bins by the use of two 28 horsepower aeration fans in each bin, which are used continuously; 6.0 That said fans have caused, still cause, and will continue to cause vibrations of the earth to take place and sundry great noises to continue night and day, thereby causing a serious change in the

character of Plaintiff's property, an injury which cannot be adequately compensated for in damages; 7.0 That the said noise and vibrations have interfered with and continue to interfere with the use and enjoyment of the Plaintiff's premises, have interfered with and continue to interfere with the comfort and enjoyment of the Plaintiff and his family in the occupation of their dwelling house situated on the Plaintiff's land, thereby making it difficult for them to sleep, have caused great disturbance to the livestock and dogs kept by the Plaintiff on his property, and have made it uncomfortable and impossible to enjoy the ordinary use of said premises and the dwelling house thereon, and to pursue the ordinary occupation of life thereon . . . ."

On October 24, 1978, the matter was submitted to the District Court, which granted a temporary restraining order "restraining the Defendant from operating any and all dryers and fans in such a manner as to interfere with the reasonable use and occupation of the Plaintiff's property by the Plaintiff upon the Plaintiff executing and undertaking in the sum of $3,000.00 as required by law." On November 2, 1978, at the hearing held for a temporary injunction, the parties stipulated that the defendant be allowed 6 months to make modifications to the fans to reduce the noise and provided that the plaintiff could reset the hearing on the temporary injunction within 10 days' notice to the defendant. An order to this effect was entered by the District Court, and the temporary restraining order of October 24, 1978, was dissolved.

It next appears that on April 11, 1979, the plaintiff moved to reset the hearing for the injunction; and on June 19, 1979, he filed an amended application in support thereof, alleging that the defendant had failed to reduce the noise nuisance within the time period stipulated by the parties.

This matter came to trial on July 13, 1979, at which time the court struck plaintiff's amended petition

and advised the parties that the case would proceed on plaintiff's original petition relating to the abatement of the noise nuisance. The record indicates that plaintiff presented his evidence that date and the trial was continued to October 25, 1979, at which time Ashton Feed presented its evidence. In its decree entered on November 16, 1979, the District Court found the noise emanating from Ashton Feed's feed-storage facility constituted a nuisance. In particular, the court stated:

"On this 16th day of November, 1979, upon consideration of the evidence and the briefs filed herein the Court finds that during 1978, the defendant erected 12 steel grain bins with ventilator fans on railroad right-of-way abutting plaintiff's land together with an unloading pit and two dryers. The unloading pit is approximately 97 feet from the plaintiff's residence. The defendant operates a feed and grain business and uses the dryers, the unloading pit, and the bins for the drying, unloading, and storage of grain which is their principal business. The plaintiff has lived in the residence since 1974. The evidence discloses that the fans on the bins are used irregularly during the year and they are used for longer periods during the harvesting season. Since the last hearing and as recently as one day prior to the last trial, the defendant has experimented with noise reduction by the erection of baffles designed to reduce the direct flow of sound from the bin fans toward plaintiff's residence. The plaintiff complains that the noise interferes with his reasonable use and occupancy of his residence and his enjoyment of his home where he lives with his wife and one son.

"The Court further finds that the plaintiff resides in the community of Ashton, Nebraska, which is a small rural community without the benefit of zoning laws. The plaintiff has somewhat of a rural residence and in his yard normally has approximately 30 hogs and 3 dogs.

"The layout of the bins and dryers shows that the

bins are arranged in two rows. One row of six closest to the center of the right-of-way have their fans pointed generally in the opposite direction of the plaintiff's house. The row of six farthest from the center of the right-of-way have their fans pointed out and away from the other bins and are directed generally toward the perimeter of the right-of-way and partially toward the residence of the plaintiff. The baffles recently erected by the defendant are partially effective in reducing the noise of the fans, but do not reduce the noise to such level as not to constitute a nuisance to the residential parties abutting the right-of-way.

"The Court further finds that had the defendant placed the bins on their leased area of the right-of-way with more space between bins, the defendant could have reasonably directed the fans toward the center of the right-of-way and away from the property of the plaintiff. The evidence indicates, however, that the bins are densely concentrated upon the leasehold leaving minimal space between the bins.

"In determining whether noise created by the defendant constitutes a private nuisance, the Court has considered the nature of the community and the nature of the residential area in which the plaintiff resides and the fact that improvements by the defendant are located upon railroad right-of-way. Further that presently the railroad only operates two trains a week upon such track.

"The Court finds that the operation of the fans on the bins and dryers can and does constitute a nuisance and unreasonably interferes with the use and occupancy of the plaintiff's residence."

Based upon the above findings, the court ordered that Ashton Feed be restrained from operating the bin fans and dryers on Saturdays and Sundays and between the hours of 8 p.m. to 7 a.m. during the week. The court also directed Ashton Feed to either baffle all the grain bin fans in the row closest to the plaintiff's property or relocate all the fans so they exhaust toward the center of the railroad right-of-way.

Ashton Feed's principal assignments of error in this appeal are that the trial court erred in finding that its operation of aeration fans located on the grain bins constituted a nuisance and in finding that the separate grain dryers were involved in the action and constituted a nuisance. Ashton Feed further assigns as error that the trial court erred in including its entire operation within the mandate of its judgment, and, also, in ordering that the fans and dryers not be operated on Saturdays.

We begin our discussion by setting forth the applicable law governing the scope of our review on appeal. This action, being one for a permanent injunction, will be heard de novo on appeal. Where an action in equity is appealed, it is the duty of this court to try the issues de novo and to reach an independent conclusion without reference to the findings of the District Court. *Prauner v. Battle Creek Coop. Creamery*, 173 Neb. 412, 113 N.W.2d 518 (1962); *Probert v. Grint*, 148 Neb. 666, 28 N.W.2d 548 (1947). This court has also held that there is no fixed or arbitrary rule governing cases of this class, and each case must be determined by the facts and circumstances developed therein. *Sarraillon v. Stevenson*, 153 Neb. 182, 43 N.W.2d 509 (1950); *Beisel v. Crosby*, 104 Neb. 643, 178 N.W. 272 (1920). As is stated in 58 Am. Jur. 2d *Nuisances* § 151 at 731-32 (1971): "An injunction against a nuisance is an extraordinary remedial process which is granted, not as a matter of right, but in the exercise of the sound discretion of the court, to be determined on a consideration of all the circumstances of each case . . . ."

We note that the operation of Ashton Feed is a lawful business under the law, and is not a nuisance per se. This does not mean, however, that it may not become a nuisance in fact, due to its operation of the storage facilities and/or its location within the community. See, *Horn v. Community Refuse Disposal, Inc.*, 186 Neb. 43, 180 N.W.2d 691 (1970); *City of Syracuse v.*

Farmers Elevator, Inc., 182 Neb. 783, 157 N.W.2d 394 (1968). A legitimate business may become a nuisance by reason of the conditions implicit in and unavoidably resulting from its operation. *Sarraillon v. Stevenson, supra.* It is on this basis that the plaintiff contends that the noise created by the operation of Ashton Feed's grain bin fans is a nuisance.

It is generally recognized that under certain circumstances noise may constitute a nuisance and be enjoined. "Generally, noise is not a nuisance per se, but it may be of such a character as to constitute a nuisance in fact, which may serve as the basis of an action at law or in equity, even though it arises from the operation of a factory, industrial plant, or other lawful business or occupation . . . ." 58 Am. Jur. 2d *Nuisances* § 62 at 629-30 (1971).

Whether noise is sufficient to constitute a nuisance depends upon its effect upon an ordinary reasonable man, that is, a normal person of ordinary habits and sensibilities. Relief cannot be based solely upon the subjective likes and dislikes of a particular plaintiff, and relief must be based upon an objective standard of reasonableness. 66 C.J.S. *Nuisances* § 22 (1950); 58 Am. Jur. 2d *Nuisances* §§ 62, 64 (1971); *Smith v. Western Wayne Co. Assn.*, 380 Mich. 526, 158 N.W.2d 463 (1968); *Sarraillon v. Stevenson, supra; Prauner v. Battle Creek Coop. Creamery, supra.* In *Kellerhals v. Kallenberger*, 251 Iowa 974, 980, 103 N.W.2d 691, 694 (1960), the Supreme Court of Iowa stated: "To justify abatement of a claimed nuisance the annoyance must be such as to cause actual physical discomfort to one of ordinary sensibilities. Such an annoyance has been shown here. There is no basis for the conclusion plaintiffs are not of ordinary sensibilities. In this connection we have held it is presumed, in the absence of evidence to the contrary, that a plaintiff has ordinary sensibilities. [Citations omitted.]"

In its testimony at the trial, Ashton Feed attempted to prove that the Daughertys were not people of ordinary

sensibilities. Neil Sullivan, a witness testifying on behalf of Ashton Feed, testified with relation to noise levels at the Ashton Feed and Grain elevator; and, in reply to a question as to whether or not the noise from Ashton Feed's grain elevator would seriously disturb a person of ordinary habits and sensibilities, stated: "No, I do not think that that would normally offend an individual. I base that on a number of different studies in terms of what sound levels are present in the number of different areas." He expressed his opinion on the basis of decibel sound levels in various cities and under varying circumstances. In reply to the opinion expressed by the witness Sullivan, the court at that time stated: "I appreciate your efforts, but the Court wonders what difference it makes as to whether or not the level in the city of Ashton now approaches the average level in the city of Chicago. The real issue is this case, in this circumstance, in this community with those circumstances and not that it doesn't exceed the average of the United States of America. . . . I don't want to argue with your position but Riverdale and Ashton are probably different than where most of the people in the United States live. Maybe they're noisier." It is clear from the above-quoted evidence that the witness Sullivan was in no way testifying with regard to the sensibilities of the Daughertys themselves, but only whether, on the basis of various scientific tests he had performed in various cities and under varying circumstances, it would be his opinion that the sound levels at Ashton Feed would not offend a person of ordinary and normal sensibilities. The fact question presented on this issue was clearly for the decision of the trial court, which apparently was not convinced by Ashton Feed's evidence that the Daughertys were not people of ordinary sensibilities in view of the fact that it issued the injunction against Ashton Feed.

In the present case, plaintiff has presented evidence which indicates that Ashton Feed's grain storage

facility is in operation during the entire year and that the hours of such operation vary with the corn and wheat harvest. There is evidence in the record that the fans in question are used on an irregular basis during the year, and for a period of about 8 to 11 hours a day; but that the fans are used for longer periods during the harvesting season, and on occasions have even been operated 24 hours a day. Plaintiff's evidence reveals that not only have he and his family been deprived of sleep on occasions but that the noise also substantially interferes with the daily activities which occur within his home. The record indicates that in response to the stipulation entered into between the parties on November 2, 1978, Ashton Feed has attempted to reduce the noise emanating from the grain bin fans by regulating the hours that such fans are in use and by attempting to baffle the noise they create with insulation materials. While the regulations governing the hours the fans are in use appear to have relieved much of the complained nuisance, the baffling of the fans has proved ineffective. John Beall, president of Ashton Feed, testified that Ashton Feed tried to baffle the aeration fans by placing bales of hay around them, but that not all the fans were so insulated by the hay.

From the evidence found in the record on appeal, we agree with the trial court that the aeration fans operated by Ashton Feed on its bins constitute a nuisance and the hours of their use should be enjoined. We note that Ashton Feed is not being enjoined from operating a grain storage business, but solely restricted in the hours such fans on the bins and dryers can be operated. The rule is well settled that a court of equity has jurisdiction to enjoin a threatened injury whenever its nature is such that it cannot be adequately compensated in damages and its continuation would occasion a constantly recurring grievance. *City of Syracuse v. Farmers Elevator, Inc.*, 182 Neb. 783,

157 N.W.2d 394 (1968); *Lowe v. Prospect Hill Cemetery Ass'n.*, 58 Neb. 94, 78 N.W. 488 (1899).

We now consider Ashton Feed's assignment of error and contention that the court erred in including within the purview of its injunction Ashton Feed's entire operation, including not only the aeration fans but also the fans on the separate grain dryers. It is true that, in its original petition for a temporary restraining order, the plaintiff only complained about the noise from the operation of the aeration fans, and Ashton Feed thus argues that it was improper for the court to also enjoin the operation of the dryers. John Beall, the president and a stockholder of Ashton Feed, testified: "Mrs. Daugherty called me up and said that the fans were making a great deal of noise. I asked her if it might be the dryer and she said, no the dryer was not causing her any problems." However, Fred Vieth, the manager of the elevator, was asked on cross-examination: "One other thing you stated that Mrs. Daugherty had a conversation with you in which she said the dryer was — wasn't of a problem. Has she discussed the fans with you at any time?" To this question, Mr. Vieth answered: "Yes, they drive her up the wall." This clearly presented a fact question as to whether or not the operation of the dryer fans were part of the nuisance suffered by the Daughertys. The trial court obviously believed that the dryers were part of the noise problem, and it specifically found as follows in its injunction: "The court finds that the operation of the fans on the bins and dryers can and does constitute a nuisance and unreasonably interferes with the use and occupancy of the plaintiff's residence." Although a review in an equity case appealed to this court is de novo, we have also frequently stated that the court will consider the fact that the trial court observed the witnesses and their manner of testifying, and must have accepted one version of the conflicting evidence over the other. In this case, we agree with the conclusions of the trial court.

It must also be remembered that in plaintiff's original petition for a temporary restraining order, and also in his subsequent application for a restraining order, he prayed "for such other and further relief as the Court may deem just and equitable." A prayer for general equitable relief is to be construed liberally, and will often justify granting relief in addition to that contained in the specific prayer, provided it fairly conforms to the case made by the petition and the evidence. See *Kellerhals v. Kallenberger*, 251 Iowa 974, 103 N.W.2d 691 (1960). A court of equity can tailor its injunction to fit the circumstances of a particular situation. It is now established law in this jurisdiction that a court of equity which has obtained jurisdiction for any purpose may retain jurisdiction for the purpose of administering complete relief between the parties with respect to the subject matter. *Hull v. Bahensky*, 196 Neb. 648, 244 N.W.2d 293 (1976). It is clear that in the instant situation the trial court balanced the equities of the situation. It did not by its injunction restrain Ashton Feed from doing business, but, on the contrary, only limited the days and hours during which Ashton Feed was prohibited from operating its fans and dryers. It further ordered Ashton Feed to endeavor to correct this situation by use of baffles, etc., and apparently Ashton Feed has taken steps to endeavor to do so. Should the desirable result be obtained by virtue of improvements in sound insulation techniques, or for other reasons, Ashton Feed can at that time apply to the court for further relief.

In view of what we have stated above, we conclude that the trial court was correct in its judgment and decree, and must be affirmed.

AFFIRMED.

SHARON L. MILLER, PERSONAL REPRESENTATIVE OF THE ESTATE OF WAYNE K. MILLER, DECEASED, APPELLANT, V. STATE OF NEBRASKA, APPELLEE.

302 N.W.2d 692

Filed February 27, 1981. No. 43184.

1. **Tort Claims Act: Negligence.** An alleged negligent act or omission is not actionable under the state Tort Claims Act unless it was the proximate cause of an injury.
2. **Tort Claims Act: Venue.** The statutory provisions authorizing the transfer of an action where the venue is improper are not applicable to suits under the state Tort Claims Act.

Appeal from the District Court for Lancaster County: HERBERT A. RONIN, Judge. Affirmed.

E. Terry Sibbernsen of Welsh, Sibbernsen and Bowen and J. Marvin Weems for appellant.

Paul L. Douglas, Attorney General, and John R. Thompson for appellee.

Heard before KRIVOSHA, C.J., BOSLAUGH, MCCOWN, BRODKEY, and WHITE, JJ., and COLWELL, District Judge.

PER CURIAM.

This is a wrongful death action against the State of Nebraska, brought in Lancaster County, Nebraska, under the state Tort Claims Act. Wayne K. Miller died as the result of injuries sustained in an automobile accident in Wheeler County, Nebraska, on January 30, 1976. The accident occurred when a pickup truck traveling in a northerly direction on U. S. Highway 281 collided with the automobile being operated by Miller. The petition alleged that the accident happened when the right front wheel of the pickup truck dropped off the hard-surfaced portion of the highway onto the soft shoulder. In attempting to turn back onto the highway, the driver of the truck lost control of his vehicle. The truck then veered across

the highway and collided head-on with the Miller vehicle.

The petition alleged that the State was negligent in failing to post warning signs; in allowing the drop-off to exist; in designing, constructing, and maintaining the highway with the shoulder 3 to 4 inches lower than the hard-surfaced portion of the highway; and in failing to provide a safe roadway.

The trial court sustained a motion of the defendant striking the allegations concerning negligent "design" of the highway from the petition. Later, the action was dismissed because it had not been filed in Wheeler County, the county where the accident occurred. The plaintiff has appealed.

Neb. Rev. Stat. § 81-8,214 (Reissue 1976) requires that the action be brought in the county where the act or omission occurred. The plaintiff's theory of the case is that the action could be brought in Lancaster County because the Department of Roads was negligent in "its policies, judgments and actions" which occurred at its principal place of business in Lancaster County, Nebraska. Only the allegation of negligent design could be considered under this theory.

The trial court sustained the motion to strike the allegation of negligence in the design of the highway on the theory that the design of the highway was a discretionary function or duty within the statutory exception. The state Tort Claims Act excludes "[a]ny claim based . . . upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a state agency or an employee of the state, whether or not the discretion be abused." Neb. Rev. Stat. § 81-8,219 (Reissue 1976). We do not decide that issue.

If we assume, for the purpose of discussion, that negligent design would not be exempt under the act, it could not be actionable until the highway was actually built. Design alone could never be the cause of an injury. In the event of an accident caused by

construction and maintenance of a highway in accordance with such a design, it would be the construction and maintenance of the highway which would be the proximate cause of any injury and the basis for the action. Accordingly, the action would have to be brought in the county where the act or omission occurred — the county where the accident happened. § 81-8,214. This construction appears to conform to the legislative intent as expressed during the consideration of the act.

The plaintiff requested that in the event the trial court determined the action could not be brought in Lancaster County, the action be transferred to Wheeler County. This request was properly denied. The statutory provisions authorizing the transfer of an action where the venue was improper are not applicable to suits under the state Tort Claims Act. *Catania v. The University of Nebraska*, 204 Neb. 304, 282 N.W.2d 27 (1979).

The judgment of the District Court is affirmed.

AFFIRMED.

BOSLAUGH, J., concurring.

While I concur in the judgment of the court, I believe the decision of the trial court that the design of the highway was a discretionary function or duty within the statutory exception was correct.

Although there is some conflict in the authorities, the majority of the cases which have considered this issue support a rule that, generally, highway design involves a discretionary function. See, *Smith v. Cooper*, 256 Or. 485, 475 P.2d 78, 84 (1970); *Donnelly v. Ives*, 159 Conn. 163, 268 A.2d 406 (1970); D. Bennett & D. Sather, *State Tort Liability — The Design, Construction and Maintenance of Public Highways — Vehicular Accidents*, 19 Drake L. Rev. 33 (1969).

In *Richardson & Gillispie v. State*, 200 Neb. 225, 263 N.W.2d 442 (1978), the allegation of negligence involved the curve in the highway where the accident had occurred. We held that "the decision to adhere to

the former design involved a discretionary function or duty which fell within the statutory exceptions under the State Tort Claims Act."

WEST NEBRASKA GENERAL HOSPITAL, A NEBRASKA NONPROFIT ORGANIZATION, APPELLANT, V. JOHN R. HANLON, COMMISSIONER, DEPARTMENT OF LABOR, STATE OF NEBRASKA, ET AL., APPELLEES.

302 N.W.2d 694

Filed February 27, 1981. No. 43221.

1. **Employment Security Law: Nonprofit Organizations.** Under the Nebraska Employment Security Law, Neb. Rev. Stat. §§ 48-601 et seq. (Reissue 1978), the contribution type of financing as provided by § 48-649 and reimbursement financing under § 48-660.01 are separate and distinct systems, and a nonprofit organization must elect to use one or the other.
2. **Statutes.** In construing a statute, the court must look to the objective to be accomplished, and the purpose to be served, and to place on it a reasonable construction which will best effect its purpose, rather than a construction which will defeat it.
3. **Employment Security Law: Nonprofit Organizations.** The Employment Security Law does not allow a reimbursing employer to acquire the experience account of its contributing predecessor and apply such account against its reimbursement charges.

Appeal from the District Court for Lancaster County: HERBERT A. RONIN, Judge. Affirmed.

Steven C. Smith of Van Steenberg, Brower, Chaloupka, Mullin & Holyoke for appellant.

Paul L. Douglas, Attorney General, and Jerold V. Fennell for appellees.

Heard before KRIVOSHA, C.J., BOSLAUGH, MCCOWN, BRODKEY, and HASTINGS, JJ.

HASTINGS, J.

The appellant, West Nebraska General Hospital (WNGH), was directed by the Nebraska Department of Labor, Division of Employment, to reimburse the Unemployment Trust Fund in the sum of $1,412 for benefits paid to WNGH employees during the quarter ending March 31, 1978. An application for review and redetermination filed before the defendant John R. Hanlon, commissioner, Department of Labor, was denied. That decision was appealed to the District Court for Lancaster County under the provisions of Neb. Rev. Stat. § 48-650 (Reissue 1978), which ruled adversely to WNGH. This appeal followed, in which WNGH assigns as error the ruling that the reserve or experience account of St. Mary Hospital (WNGH's predecessor) could not be transferred to the credit of WNGH and used to offset the latter's reimbursement charges. We affirm the judgment of the District Court.

The underlying facts are not in dispute. WNGH is a nonprofit corporation which, on January 1, 1972, elected to become liable for payments to the Unemployment Compensation Fund in lieu of contributions, and has made payments on the reimbursable basis pursuant to Neb. Rev. Stat. § 48-660.01(2) (Reissue 1978). On August 19, 1977, St. Mary Hospital (St. Mary) executed a contract of sale of all its property, assets, and employees to WNGH as purchaser. The property sold specifically included "so much of Seller's unemployment compensation reserve fund which is legally transferable." The sale took place on November 30, 1977, and the commissioner was duly notified of the acquisition.

Prior to the sale, St. Mary was an employer subject to the Employment Security Law, and was making contributions to the Unemployment Compensation Fund on the regular contributory basis. These contributions, as provided by Neb. Rev. Stat. § 48-649 (Reissue 1978), required contributions at a maximum rate ranging from 2.7 percent to 3.7 percent of an employer's annual payroll, depending upon whether

that employer's experience account at the beginning of the year exhibits a positive or negative balance. It was stipulated that on the date of sale there was a positive balance of $81,766.18 in the experience account of St. Mary, and the contribution rate for the calendar year 1978 was .3 percent. WNGH is billed on a quarterly basis by the commissioner for an amount equal to the full amount of regular benefits plus one-half of the amount of extended benefits paid during the preceding quarter, as provided by § 48-660.01(2). On May 24, 1978, the commissioner notified WNGH that benefits of $1,412 had been charged to its account for the first quarter of 1978, and demanded reimbursement of that account. WNGH filed an application for review and redetermination, requesting that the amounts which were credited to the St. Mary reserve or experience account be credited to WNGH and applied to the statement for the first quarter of 1978 for payments in lieu of contributions due from WNGH and all future statements until the St. Mary reserve account reaches a balance of zero.

As authority for its request, WNGH cites Neb. Rev. Stat. § 48-654 (Reissue 1978), which states in part: "Any employer that acquires the organization, trade, or business, or substantially all the assets thereof, of another employer shall immediately notify the commissioner thereof, and shall assume the position of such employer *with respect to the resources and liabilities of such employer's experience account* as if no change with respect to such employer's experience account has occurred . . . ." (Emphasis supplied.) The commissioner takes the position that the above statute applies to an acquisition by an employer using the contributory basis and not to an employer using the reimbursable basis. Both parties agree that the issue is one of statutory construction.

The Employment Security Law requires a nonprofit organization to pay contributions on a regular basis unless it elects to reimburse the commissioner

for actual benefits paid by him, as provided by § 48-660.01(1) and previously set forth herein. The regular basis applies a contribution rate applicable to each employer on the basis of his actual experience in the payment of contributions and with respect to benefits charged against his separate experience account. § 48-649. Experience rating is based on the proposition that those employers whose workers suffer the most involuntary unemployment should pay at a higher rate than those employers whose workers suffer little involuntary unemployment. The basic principle is that employers who stabilize employment are rewarded by lower contribution rates. [1976] 1B Unemploy. Ins. Rep. (CCH) ¶ 1120.

Reimbursement financing is a method which allows the organization to reimburse the Unemployment Compensation Fund for the amount actually paid out. Nonprofit organizations are automatically subject to the regular experience rating provisions unless they elect the reimbursement method of financing. By using this method they are, in essence, self-insurers and are liable for such benefit costs for their employees, but are not liable for the cost of any other benefits. *Maryland Empl. Sec. v. Holy Cross Hosp.*, 43 Md. App. 406, 405 A.2d 766 (1979). They further escape the burden of paying the administrative costs of the system. See *St. Joseph, etc. v. Employment Sec. Dept.*, 92 Wash. 2d 353, 597 P.2d 393 (1979).

The two systems are separate and distinct, and a nonprofit organization must elect to use one or the other. WNGH has attempted to overlap the two systems by applying its predecessor's experience account to its own reimbursement account. We find no authority which allows such action, and logic dictates a contrary conclusion. Section 48-654, which allows an acquiring organization to assume the position of its predecessor with respect to the latter's experience account, refers to the contribution rate of that employer. The experience account balance is used to determine the rate

at which the employer must contribute, and it is not a cash account which may be treated as a liquid asset. If WNGH had not elected to use the reimbursement financing method and was liable for regular contributions, then it would be required to assume the position of its predecessor with regard to its experience account and contribution rate. To that extent, it would have been entitled to assume the positive experience balance possessed by St. Mary. However, to overlap the two systems, as urged by WNGH, would result in the payment of benefits from the Unemployment Compensation Fund without a corresponding payment of contributions or reimbursement. We are certain that the Legislature could not have intended to give the reimbursing employers a "free ride" at the expense of the contributing employers. See *Mann Home v. Morgan*, 19 Or. App. 853, 529 P.2d 964 (1974).

In construing a statute, the court must look to the objective to be accomplished, and the purpose to be served, and to place on it a reasonable construction which will best effect its purpose, rather than a construction which will defeat it. *Evans v. Metropolitan Utilities Dist.*, 187 Neb. 261, 188 N.W.2d 851 (1971). We agree with the commissioner and the District Court in determining that the Employment Security Law does not allow a reimbursing employer to acquire the experience account of its predecessor and apply such account against its reimbursement charges. The judgment of the District Court is affirmed.

AFFIRMED.

CLINTON and WHITE, JJ., participating on briefs.

NEWMAN GROVE CREAMERY COMPANY, APPELLEE, V. HOWARD DEAVER ET AL., APPELLANTS.

302 N.W.2d 697

Filed February 27, 1981. No. 43225.

1. **Uniform Commercial Code: Consideration.** Under the Uniform Commercial Code, no consideration is necessary for an instrument given as security for a debt already owed by the party giving it or by a third person.
2. **Pleadings: Demurrer.** A demurrer ore tenus is a permissible practice; and if a pleading to which it is addressed is totally defective, it is error to admit any evidence under such pleading.
3. **Pleadings.** Under our system of code pleading, a party is required to plead the fact, not the theory of recovery or defense; and generally speaking, the pleading of legal conclusions is insufficient to raise an issue of fact.
4. **Pleadings: Trial.** Where an objection that a pleading does not state a cause of action or a defense is interposed for the first time during the trial of a cause or after verdict, the pleading must be liberally construed in light of the entire record, and, if possible, sustained.
5. **Pretrial Conferences.** The purpose of a pretrial conference is to simplify and to narrow the issues of the case and to avoid traps and surprises.
6. **Pleadings: Demurrer.** Generally, it constitutes an abuse of discretion to sustain a demurrer without leave to amend where there is a reasonable possibility that the defect can be cured by amendment.

Appeal from the District Court for Madison County: RICHARD P. GARDEN, Judge. Affirmed in part, and in part reversed and remanded with directions.

Crosby, Guenzel, Davis, Kessner & Kuester and James F. Brogan for appellants.

Vince Kirby for appellee.

Heard before KRIVOSHA, C.J., MCCOWN, WHITE, and HASTINGS, JJ., and MURPHY, District Judge.

HASTINGS, J.

The plaintiff, Newman Grove Creamery Company (Creamery), brought suit against Howard Deaver and Betty Deaver for recovery on a promissory note in the principal amount of $15,948.11. The District

Court for Madison County, without a jury, granted judgment against the Deavers in the amount of the note, together with costs of the action. The Deavers appeal, assigning as error: (1) That the court erred in finding that no consideration is necessary for an instrument or obligation given for an antecedent debt owed by a third person; and (2) That the court erred in sustaining the plaintiff's demurrer ore tenus as to the defendants' answer alleging duress in the execution of the note. We affirm in part, and in part reverse the judgment of the trial court.

Howard Deaver was employed as manager of the plaintiff Creamery, during which time credit was extended to his son, Scott Deaver, for products purchased from the Creamery. On or about November 15, 1977, Howard and Betty Deaver executed a blank promissory note to the Creamery. The blanks were filled in sometime later by Harold Conford, chairman of the board of the Creamery, in the amount of $15,948.11. That amount was the approximate balance of the account owed by Scott as of November 30, 1977. In defendants' answer to the petition, they alleged that there was no consideration given for the execution of the note, as well as that the note was signed under duress.

A pretrial order was filed on November 9, 1979, which stated: "All pre-trial motions concerning amendment of pleadings and all motions in limine shall be filed and noticed for hearing and heard before the Court at least ten days prior to trial." Trial was held on December 4, 1979. The plaintiff offered the note in evidence, as well as parts of the pretrial stipulation, and rested. The plaintiff then demurred ore tenus to the defendants' answer, for the reason that it failed to state facts which constituted an affirmative defense to the action. The court sustained the demurrer ore tenus so far as it concerned the defense of duress. However, the court overruled the demurrer as it related to the question of consideration. The trial then

proceeded on the issue of consideration.

The first assignment of error concerns the finding by the trial court that no consideration is necessary for an instrument or obligation given for an antecedent debt owed by a third person. Neb. U.C.C. § 3-408 (Reissue 1971) states in part: "Want or failure of consideration is a defense as against any person not having the rights of a holder in due course (section 3-305), *except that no consideration is necessary for an instrument or obligation thereon given in payment of or as security for an antecedent obligation of any kind.*" (Emphasis supplied.) The comments to that code section state that the "except" clause includes a debt owed by a third person. We recognized this exception in *First Nat. Bank of Omaha v. Kizzier*, 202 Neb. 369, 275 N.W.2d 600 (1979), by declaring that no consideration is necessary for an instrument given as security for a debt already owed by the party giving it or by a third person.

The appellants argue that the comment which refers to an antecedent debt of a *third person* goes beyond the words of the code section and should not be given effect. The appellants cite no authority for this proposition, nor have we found any. On the contrary, the case law uniformly gives effect to the comments, in holding that an antecedent debt by a third person is a good substitute for consideration.

"The comments to UCC 3-408 indicate that the drafters intended the words 'an antecedent obligation of any kind' to include the antecedent debt of a third party . . . ." *Musulin v. Woodtek, Inc.*, 260 Or. 576, 579, 491 P.2d 1173, 1175 (1971). That case was followed in *First National Bank of Elgin v. Achilli*, 14 Ill. App. 3d 1, 301 N.E. 2d 739 (1973), which states that a note signed as security for an antecedent claim or debt needs no consideration, even though the note is signed by a third party. See, also, *Kitzer v. Kitzer*, 20 Ill. App. 3d 54, 312 N.E.2d 699 (1974); *First Nat. Bank of Jackson v. Carver*, 375 So. 2d 1198 (Miss. 1979); *Dauzat*

v. Bordelon, 145 So. 2d 41 (La. App. 1962); *Paige v. Mesisco*, 144 So. 2d 908 (La. App. 1962).

The trial court was correct in holding that no consideration is necessary where the note was given as security for the antecedent debt of a third person. The first assignment of error has no merit.

The second assignment of error concerns the sustaining of the demurrer ore tenus as to the defendants' allegations of duress. It has been well established that a demurrer ore tenus is a permissible practice; and if a pleading to which it is addressed is totally defective, it is error to admit any evidence under such pleading. *Dickinson v. Lawson*, 125 Neb. 646, 251 N.W. 656 (1933).

The pleading attacked by the plaintiff was paragraph three of defendants' answer: "3. Defendants specifically deny that any consideration was given for the execution of said note and allege that said note was signed under duress." No other facts were pleaded to support either of those allegations. To this answer the plaintiff, rather than moving to make the answer more definite or filing a demurrer to the same, filed a reply in the nature of a general denial.

At the trial, following plaintiff's rest and before the defendants called any witnesses, the plaintiff demurred ore tenus. The trial court overruled the demurrer as to the allegation of lack of consideration, but sustained it as to the claim of duress. Defendants' counsel made no attempt to adduce any evidence supporting such latter allegation, although in describing a conversation had with the chairman of the board of the plaintiff company, the defendant Howard Deaver did testify without objection that "Harold [the chairman] told me that he would fire me if I didn't sign the note."

When signatures on an instrument are admitted, as was done here, the production of the instrument entitles a holder to recover on it unless the defendant establishes a defense. Neb. U.C.C. § 3-307 (Reissue

1971). Such a defense must be affirmatively pleaded. *Center Bank v. Mid-Continent Meats, Inc.*, 194 Neb. 665, 234 N.W.2d 902 (1975).

"Under the Nebraska system of code pleading, the plaintiff is required to plead the facts, not the theory of recovery." *Remington v. Bryan*, 205 Neb. 372, 380, 288 N.W.2d 253, 258 (1980). "The pleading of legal conclusions is insufficient to raise an issue of fact." *Timmerman v. Hertz*, 195 Neb. 237, 244-45, 238 N.W.2d 220, 225 (1976).

However, the appellants argue that the demurrer ore tenus was not timely and therefore should not have been sustained. The trial court had entered a pretrial order requiring all motions concerning amendment of pleadings and all motions in limine to be filed, noticed for hearing, and heard before the court at least 10 days prior to trial. It has long been the rule in this jurisdiction that questions relating to the sufficiency of the petition should be determined before the cause comes on for trial. *Contois Motor Co. v. Saltz*, 198 Neb. 455, 253 N.W.2d 290 (1977). "[W]here an objection that a petition does not state a cause of action is interposed for the first time during the trial of a cause or after verdict, the pleading must be liberally construed in light of the entire record, and, if possible, sustained." *Id.* at 462, 253 N.W.2d at 294. The petition will be liberally construed in the light of the entire record; and if the essential elements of the plaintiff's case may be inferred from the petition by reasonable intendment, it will be held sufficient. *Gibbs v. Johns*, 183 Neb. 618, 163 N.W.2d 110 (1968).

Generally, a demurrer ore tenus is considered as an objection to the introduction of evidence, rather than a pleading. Therefore, it may be doubtful that it was included within the court's order requiring the filing of motions 10 days prior to trial. It is also true that at least since 1878 it has been the rule in Nebraska that an objection to the admission of evidence on the ground that a petition does not state a cause of action may

be made at any time during trial. *Curtis & Co. v. Cutler*, 7 Neb. 315 (1878). We might note in passing, however, that the case of *Van Housen v. Broehl*, 59 Neb. 48, 80 N.W. 260 (1899), suggests that where two or more defenses are raised in an answer, a general demurrer will be overruled where at least one of the defenses is well pleaded.

Be that as it may, we agree with the Michigan Court of Appeals that "[a] pretrial conference is conducted before trial in order to simplify and to narrow the issues of the case and to *avoid traps and surprises.*" (Emphasis supplied.) *Jamison v. Lloyd*, 51 Mich. App. 570, 573, 215 N.W.2d 763, 764 (1974). Somewhat amplifying that statement is the following from *State Highway Comm. v. Redmon*, 42 Mich. App. 642, 646, 202 N.W.2d 527, 529 (1972): "[C]ounsel cannot sit idly by and then for the first time interpose objections at trial."

The defect in the answer did not affect the substantial rights of the plaintiff and the objection, coming when it did, should have been disregarded. *Contois Motor Co. v. Saltz, supra.* Although defendants' attorney did not ask for leave to amend his answer when the deficiency was raised, he might well have done so and his request would have been granted. "It 'generally constitutes an abuse of discretion to sustain a demurrer without leave to amend where there is a reasonable possibility that the defect can be cured by amendment, particularly in the case of an original complaint.' [Citation omitted.] We feel the ends of justice will be served in this case by permitting plaintiff to amend its petition." *Cagle, Inc. v. Sammons*, 198 Neb. 595, 604, 254 N.W.2d 398, 404 (1977).

If plaintiff was concerned as to the nature of defendants' claim of duress, it should have reached that issue by motion or a demurrer timely filed and ruled upon.

The District Court was correct in ruling in favor of the plaintiff on the issue of consideration. However,

as we have pointed out above, the court should not have sustained the demurrer ore tenus relating to the issue of duress, and its judgment in that regard is reversed and the cause is remanded for further proceedings consistent with this opinion.

AFFIRMED IN PART, AND IN PART REVERSED AND REMANDED WITH DIRECTIONS.

STATE OF NEBRASKA, APPELLEE, V. JERRY A. WREDT, APPELLANT.

302 N.W.2d 701

Filed February 27, 1981. No. 43484.

Sentences: Appeal and Error. A sentence within statutory limits will not be disturbed on appeal in the absence of an abuse of discretion by the trial court.

Appeal from the District Court for Otoe County: RAYMOND J. CASE, Judge. Affirmed.

William B. Zastera for appellant.

Paul L. Douglas, Attorney General, and Judy K. Hoffman for appellee.

Heard before KRIVOSHA, C.J., BOSLAUGH, MCCOWN, CLINTON, BRODKEY, WHITE, and HASTINGS, JJ.

HASTINGS, J.

Jerry A. Wredt, the defendant, pleaded guilty to the December 4, 1979, second degree murder of his father, Jerry L. Wredt, and was sentenced to confinement to the Nebraska Division of Corrections, Department of Institutions, for a term of life. He has appealed to this court, contending only that the sentence was excessive.

Murder in the second degree is a violation of Neb. Rev. Stat. § 28-304 (Reissue 1979) and is a Class IB felony. The punishment provided by law is a minimum term of imprisonment of 10 years and a maximum

term of life. This, in fact, is the effect of the sentence here imposed.

The defendant was 16 years old at the time of the commission of the crime, having been born on June 8, 1963. He was the eldest of four children, and his natural mother had died of a drug and alcohol overdose on April 14, 1974. The father, who was 40 years old at the time of his death, had been married to his present wife, Sheri, for approximately 5 years. She was 30 years of age and had five children by a former marriage. In addition, they had a 3-year-old child of their own. The defendant lived in Syracuse, Nebraska, with his father, stepmother, and some of the children.

The record indicates that the victim had a vile and at times uncontrollable temper, and certain vicious propensities. His own brother stated that he had heard him threaten to kill their parents, his wife Sheri, and numerous other people. The defendant told of several times seeing or hearing his father abuse and assault his natural mother. He also said that his father kept threatening to hurt Sheri.

Additionally, Sheri, the stepmother, stated that the victim and she were having a stormy marriage, and that he had threatened and abused her on occasion. The defendant said that he was afraid of his father, not only because of possible harm to himself but because he was particularly worried about possible injury to Sheri. Apparently, there had been discussions between the defendant and Sheri, as well as between Sheri and a woman friend, as to what could be done to alleviate the problem. On the evening before the homicide, Sheri asked the defendant "how we could kill him." The defendant suggested that she could use a butcher knife. Nothing more was discussed that evening. The following day, according to the defendant, Sheri again asked "how could we kill him," and the defendant suggested that they could shoot him. Various plans to make the shooting appear to be self-defense or accidental were discussed during the rest of the day. Sheri showed

the defendant where the victim kept his guns, and the defendant selected a .45-caliber revolver. The defendant test-fired the revolver outside to make certain that it functioned properly. Further, according to the defendant's statement given to the authorities, the discussion centered around the fact that the defendant would be able to have the victim's pickup truck and then would have the insurance money.

The final plan agreed upon, and executed, was that the defendant took the revolver outside and waited for the victim to come home, which he did shortly after 6 p.m. After the victim got out of his truck and started walking toward the house, the defendant stepped out from the corner of the house, aimed and cocked the revolver, and fired one shot into his father's chest. Apparently, the shot was almost immediately fatal.

The defendant was originally charged with the crime of murder in the first degree, but pleaded guilty to the amended charge of murder in the second degree. Although no issue is raised other than the claimed excessiveness of the sentence, we do observe from a complete review of the record that at the arraignment the district judge plainly and completely explained to the defendant, in the presence of his attorney, all of his rights and the consequences of a guilty plea, and the defendant freely, voluntarily, and knowingly waived these rights.

In his brief, the defendant points out 18 different mitigating factors which he insists militate against imposing the maximum sentence in this case. These may be summarized to include the defendant's chronological age, at the time, of 16 years, 5 months; a maturity level of 13 to 14 years of age; the defendant suffered from a mild to severe neurosis, was submissive to authoritarian figures, possessed a need to please, and suffered from obsessionalism; the absence of prior criminal activity and no signs of previous antisocial or violent behavior; the abusive and threatening behavior of the victim toward the family; the pressure

or influence exerted by the stepmother; and the need for treatment by experts in the field of juvenile psychiatry. We would agree that the record supports such factual findings. The question which we must decide is whether such elements are sufficient for us to conclude that the trial court abused its discretion in imposing a sentence within the statutory limits. *State v. Hawkman*, 198 Neb. 578, 254 N.W.2d 90 (1977).

The record does not disclose the consequences which the stepmother may have suffered or will be subjected to for her role in this tragic episode. Whatever influence she may have had on the defendant, it was he who made the final plans and carried them out in a cold and calculating manner, resulting in the death of his father. The facts could have supported a conviction for first degree murder for which life imprisonment would have been the minimum sentence.

The defendant cites *State v. Sturm*, 189 Neb. 299, 202 N.W.2d 381 (1972), as supporting his position that a past history of violence on the part of the victim constitutes a mitigating circumstance which should influence the sentence. However, we are not prepared to say in this case that the victim was a bad man and deserved to die and therefore the trial judge abused his discretion in imposing the maximum sentence. As announced by the trial judge at the time of sentencing, a lesser sentence would have depreciated the seriousness of the crime and promoted disrespect for the law. Neb. Rev. Stat. § 29-2260(2)(c) (Reissue 1979). This we believe was a legitimate and overriding concern in this case.

The judgment and sentence of the District Court is affirmed.

AFFIRMED.

McCOWN, J., dissenting.

To approve a maximum sentence of life imprisonment on the guilty plea of a 16-year-old boy with no prior criminal record under the specific facts and circumstances outlined in the majority opinion consti-

tutes a complete abdication of the duty of this court to review and correct excessive sentences. In my view, a maximum sentence of 20 years would have been more than sufficient to satisfy societal demands for retribution.

STATE OF NEBRASKA, APPELLEE, V. GEORGE L. SHEPARD, APPELLANT.

302 N.W.2d 703

Filed February 27, 1981. No. 43544.

1. **Sentences: Post Conviction.** Matters relating to sentences imposed within statutory limits and matters already litigated or which could have been raised are not properly included in an action seeking post conviction relief.
2. **Post Conviction: Appeal and Error.** A defendant in a post conviction proceeding may not raise questions which could have been raised on direct appeal and which do not involve questions making the judgment of conviction void or voidable under the state or federal Constitutions.
3. **Post Conviction: Proof.** In a post conviction proceeding, the petitioner has the burden of establishing a basis for relief.
4. **Pleas.** The standard for determining the validity of a guilty plea is whether or not it represents a voluntary and intelligent choice among the alternative courses of action open to the defendant.
5. **Criminal Law: Effectiveness of Counsel.** The standard for determining whether defense counsel has rendered constitutionally required effective assistance is whether counsel has performed at least as well as a lawyer with ordinary training and skill in the criminal law in that area and has conscientiously protected the interests of his client.
6. ____: ____. In order for one to maintain ineffective counsel the record must affirmatively support the claim.

Appeal from the District Court for Nance County: JOHN C. WHITEHEAD, Judge. Affirmed.

George L. Shepard, pro se.

Paul L. Douglas, Attorney General, and Linda A. Akers for appellee.

Heard before KRIVOSHA, C.J., BOSLAUGH, MCCOWN, CLINTON, BRODKEY, WHITE, and HASTINGS, JJ.

KRIVOSHA, C.J.

The appellant, George L. Shepard (Shepard), appeals from an order entered by the District Court for Nance County, Nebraska, denying Shepard's request for post conviction relief filed pursuant to the provisions of Neb. Rev. Stat. §§ 29-3001 to 29-3004 (Reissue 1979). For reasons more particularly set out below, we affirm the judgment of the District Court denying post conviction relief.

The record reflects that Shepard was originally charged with first degree sexual assault. He retained counsel of his own choosing and entered a plea of not guilty. The record available to us in this matter reflects that on March 29, 1978, Shepard appeared with his attorney before the trial court, at which time he withdrew his plea of not guilty and entered a plea of guilty to the charge.

Before accepting the plea of guilty, the trial court meticulously reviewed with Shepard all of his constitutional rights and the consequences of his withdrawing the plea of not guilty and entering a plea of guilty. Only after the trial court satisfied itself that Shepard fully understood what he was doing, and, indeed, was entering the plea of guilty freely and voluntarily, did the trial court accept the plea of guilty.

The record made before the trial court further indicates that the plea of guilty was entered by Shepard as a result of a plea bargain in which the State dismissed a charge of breaking and entering and further agreed not to make any recommendation with regard to the sentence to be imposed by the court in the instant action. Furthermore, the State, as part of the plea bargain, agreed that it would file no other charges against Shepard, including a charge of being a sexual sociopath under the provisions of Neb. Rev. Stat. §§ 29-2901 et seq. (Reissue 1975).

After accepting the plea, the trial court asked Shepard to describe to the court the circumstances surrounding the crime for which he had just entered a

plea of guilty. Shepard then freely and voluntarily described in detail all of the events connected with the sexual assault. The details as described by Shepard leave no doubt that a first degree sexual assault was committed upon the victim. There was more than sufficient evidence upon which Shepard could have been convicted had he gone to trial.

A presentence investigation was then ordered and a further hearing held. As a result of the further hearing, Shepard was sentenced to from 7 to 21 years in the Nebraska Penal and Correctional Complex.

Shepard, appearing pro se, now raises several assignments of error. They are as follows: (1) That the sentence imposed by the court was excessive; (2) That the evidence upon which the guilty plea was accepted was insufficient; (3) That the court erred in not granting Shepard a trial for the reason that perjured and false testimony was given against him by the prosecuting attorney; (4) That the court erred in not requiring (sic) as to what deals were made in order that the defendant changed his plea from "not guilty" to "guilty"; (5) That the court erred in allowing the State to threaten Shepard with a charge of sexual sociopath, when in fact there was no evidence to support the fact; and (6) That the court erred in not asking Shepard if he had anything to say before sentencing.

We may quickly dispose of all of these matters. The claims that the sentence was excessive and that the evidence of the crime was insufficient may be disregarded without further consideration. Following Shepard's conviction, he appealed his sentence to this court. He did not raise any issue about the sufficiency of the evidence in that appeal. In Shepard's earlier direct appeal we found that the sentence was not excessive and affirmed the judgment pursuant to Rule 20 of this court. See *State v. Shepard*, case No. 42274. This court has consistently held that matters relating to sentences imposed within statutory limits and matters already litigated or which could have been raised are

not properly included in an action seeking post conviction relief. *State v. Miles*, 194 Neb. 128, 230 N.W.2d 227 (1975); *State v. Taylor*, 193 Neb. 388, 227 N.W.2d 26 (1975); *State v. Birdwell*, 188 Neb. 116, 195 N.W.2d 502 (1972); *State v. Weiland*, 190 Neb. 111, 206 N.W.2d 336 (1973); *State v. Lincoln*, 186 Neb. 783, 186 N.W.2d 490 (1971). A defendant in a post conviction proceeding may not raise questions which could have been raised on direct appeal and which do not involve questions making the judgment of conviction void or voidable under the state or federal Constitutions. *State v. Huffman*, 186 Neb. 809, 186 N.W.2d 715 (1971); *State v. Lacy*, 198 Neb. 567, 254 N.W.2d 83 (1977).

Insofar as the claim that there was perjured and false testimony given, the record is simply devoid of any evidence to support that claim, and we likewise reject that assignment of error. In a post conviction proceeding, the petitioner has the burden of establishing a basis for relief. *State v. Rapp*, 186 Neb. 785, 186 N.W.2d 482 (1971).

The balance of Shepard's assignments of error, while couched in different terms, essentially argue that his plea of guilty was not freely and voluntarily made and that he had inadequate counsel. We may likewise easily reject those two claims from an examination of the record.

The trial court inquired in great detail as to what the plea bargain was. There is no evidence to support Shepard's claim to the contrary. We have previously held that: "The standard for determining the validity of a guilty plea is whether or not it represents a voluntary and intelligent choice among the alternative courses of action open to the defendant." *State v. Hall*, 188 Neb. 130, 195 N.W.2d 201 (1972) (syllabus of the court). The record in this case clearly establishes that Shepard understood all of the various alternatives open to him and freely and voluntarily made that choice in entering a plea of guilty.

Insofar as his claim of ineffective counsel is con-

cerned, we likewise reject that claim. As we have frequently said, the standard for determining whether defense counsel has rendered constitutionally required effective assistance is whether counsel has performed at least as well as a lawyer with ordinary training and skill in the criminal law in that area and has conscientiously protected the interests of his client. *State v. Leadinghorse*, 192 Neb. 485, 222 N.W.2d 573 (1974); *State v. Colgrove*, 207 Neb. 496, 299 N.W.2d 753 (1980). The trial court specifically inquired of Shepard whether he was satisfied with his counsel. He responded he was. The record establishes without any contradiction that the evidence was more than sufficient to convict Shepard of the crime charged. It appears that his counsel did everything that was possible under the circumstances, though admittedly there was not much which could be done. In order for one to maintain ineffective counsel the record must affirmatively support the claim. *State v. Rose*, 188 Neb. 84, 195 N.W.2d 215 (1972). The record in this case does not in any manner support that claim.

The events of this case seem to support the observations made by the Court of Appeals in *Wolfe v. Nash*, 313 F.2d 393 (8th Cir. 1963), *cert. denied* 374 U.S. 817, 83 S. Ct. 1713, 10 L. Ed. 2d 1041 (1963), where the court there said: "The truth is, of couse, that to the criminal mind no trial is fair that does not result in an acquittal, no jury is impartial that does not return a verdict of not guilty, and no counsel is effective if the defendant is convicted, notwithstanding the evidence against him." *Id.* at 401. There is no merit to any of Shepard's claims for post conviction relief. We therefore affirm the judgment of the trial court in denying such relief.

AFFIRMED.

IN RE INTEREST OF SHAWNA KIMSEY, A MINOR CHILD. STATE OF NEBRASKA ET AL., APPELLANTS, V. DENNIS KIMSEY, APPELLEE.

302 N.W.2d 707

Filed March 6, 1981. No. 43145.

1. **Parental Rights.** Under Neb. Rev. Stat. § 43-209 (Reissue 1978), a person's parental rights may be terminated only upon presentation of clear and convincing evidence.
2. ——. The right of parents to maintain the custody of their child is a natural right subject only to the paramount interest which the public has in the protection of the rights of a child.
3. **Child Custody.** While there may be no direct affirmative evidence of child abuse, where there is ample evidence of neglect and a lack of proper parental care directly and adversely injurious to the health, safety, and well-being of the child, the best interests of the child become paramount.
4. **Parental Rights.** Parental rights may be forfeited by substantial, continuous, and repeated neglect of a child and a failure to discharge the duties of parental care and protection.
5. **Parental Duties.** Both parents have duties to their children; a father cannot delegate those duties to the mother of his children and expect to be held harmless if she neglects the children.

Appeal from the District Court for Hall County: LLOYD W. KELLY, JR., Judge. Reversed with directions.

James D. Livingston, guardian ad litem, of Cunningham, Blackburn, VonSeggern, Livingston, Francis & Riley, for appellant Shawna.

Richard E. Weaver for appellant State.

Duane A. Burns of Mayer, Burns & Mayer for appellee.

Heard before KRIVOSHA, C.J., BOSLAUGH, MCCOWN, CLINTON, BRODKEY, WHITE, and HASTINGS, JJ.

WHITE, J.

This is an appeal by the State of Nebraska and the guardian ad litem of Shawna Kimsey, minor child born December 4, 1976. The appellants assign as error

the District Court's finding that there was no clear and convincing evidence presented to justify the county court's termination of parental rights of the father, Dennis Kimsey, to Shawna Kimsey. The mother's parental rights to the child were also terminated in the county court; she appealed, and the District Court affirmed the decision of the lower court. She did not appeal here and that matter is not before us.

After a hearing on September 1, 1977, the court held that Shawna Marie Kimsey was a child within the meaning of Neb. Rev. Stat. § 43-202(2)(e) (Reissue 1978), "who is in a situation or engages in an occupation dangerous to life or limb or injurious to the health or morals of such child." Dennis and Karin Kimsey were allowed to retain custody of the child, but under the supervision of the Hall County Department of Welfare for a period of 1 year. As part of the court order, Karin was ordered to attend Alcoholics Anonymous meetings for a period of 1 year and Dennis was ordered to attend Al-Anon meetings for the same period of time.

On October 28, 1977, Karin Kimsey gave birth to a second child, Cynthia. The child was born with multiple physical and psychological problems. The court was informed by counsel at oral argument that Cynthia Kimsey had died during the pendency of the appeal, after having spent substantially all of her short life either in a hospital or in the care of foster parents.

On November 4, 1977, an Alcoholics Anonymous sponsor found Karin Kimsey intoxicated and passed out in her apartment and notified the welfare department. The department of welfare took temporary care of Shawna Kimsey. There was another hearing on November 9, 1977. As a result of that hearing, physical custody of Shawna was given to Dennis under the supervision of the Hall County Department of Welfare, but actual physical possession of the child was given to Dennis' father and stepmother.

In March 1978, and in violation of a court order, Dennis removed the child from Nebraska to Le Mars, Iowa. The child was recovered by Iowa authorities on March 6, 1978, initially placed in Children's Village, and then returned to Dennis' stepmother.

On March 14, 1979, Dennis' stepmother was stricken with an illness and Shawna was taken from her and placed in another temporary foster home. Again, on April 29, 1979, Shawna was removed from that temporary foster home and sent to another. Shawna had begun exhibiting evidence of severe emotional insecurity, determined to be a direct result of the many and various environments which she had been placed into and then removed from. Shawna was admitted to St. Francis Hospital in Grand Island, Nebraska, for treatment of serious nervous and psychiatric disorders, and on June 28, 1979, she was taken to the Nebraska Psychiatric Institute. Subsequently she was placed in yet another foster home.

The final termination hearing in the county court was held on July 13, 1979, 2 years after the initial hearing. By the time of this hearing, the court had received recommendations to terminate parental rights of both parents from representatives of the Hall County Department of Welfare, the Plains Area Mental Health Center at Le Mars, Iowa, and the Iowa Department of Social Services, Plymouth County, Iowa. The court also heard evidence that Dennis and Karin had been divorced on June 4, 1979, and finally determined that the best interests of the minor dictated that the parental rights of both Karin and Dennis be terminated. Dennis Kimsey then appealed the termination of his rights to the District Court for Hall County.

The District Court reversed the order of the Hall County Court and ordered that legal custody of Shawna Kimsey be given to Dennis and that physical custody be given to his natural mother who lives in Missouri. As of the date of the hearing, Shawna had

only recently become slightly acquainted with this woman.

We are concerned with one assignment of error, i.e., whether the District Court erred in finding that there was not clear and convincing evidence presented to justify the termination of Dennis Kimsey's parental rights to Shawna Kimsey. Under Neb. Rev. Stat. § 43-209 (Reissue 1978), a person's parental rights may be terminated only upon presentation of clear and convincing evidence. *State v. Souza-Spittler*, 204 Neb. 503, 283 N.W.2d 48 (1979); *State v. Hamilton*, 204 Neb. 537, 283 N.W.2d 66 (1979).

The right of a parent to maintain the custody of his or her child is a natural right subject only to the paramount interest which the public has in the protection of the rights of a child. *Linn v. Linn*, 205 Neb. 218, 286 N.W.2d 765 (1980); *State v. Metteer*, 203 Neb. 515, 279 N.W.2d 374 (1979). Further, in a proceeding to terminate parental rights under § 43-209(6), there must be a determination that the child is one described in subsection (1) or (2) of § 43-202 and that reasonable efforts, under the direction of the court, have failed to correct the conditions leading to that determination.

The county court first determined that Shawna was a neglected child when her mother was arrested for public drunkenness and it was discovered that her mother was an alcoholic. Although the record shows that Karin Kimsey has struggled to overcome her alcoholism, she has not yet succeeded. Karin has been an inpatient at a number of alcoholism treatment centers in both Nebraska and Iowa, and at the time of trial she was residing in a halfway house in Iowa.

Some background is necessary. Karin Kimsey is a native of Germany and the mother of a young girl who lives there still. It appears from the record that when Dennis married Karin he promised that they would continue to live in Germany after their marriage so that Karin could keep in contact with her daughter. For reasons not shown in the record, that promise

was not kept and the parties transferred to Nebraska. While they were living in Grand Island, Nebraska, Dennis was an over-the-road truckdriver and was away from home far more frequently than he was present. Karin was essentially alone and friendless in a strange community and she turned to alcohol as a solace. It was to this alcoholic condition that the first efforts of the county court of Hall County were directed in an effort to rehabilitate Karin and to help her conquer the alcoholism. It is not necessary to relate the evidence in detail. Dennis made little, if any, attempt to attend or benefit from counseling sessions. Finally, he abandoned the Al-Anon sessions altogether, continued to offer little or no support to Karin in her attempt to eliminate her alcoholism problem, and saw his daughter Shawna only infrequently, if at all.

When he removed himself to Le Mars, Iowa, it was with the pronounced intention of eliminating the overnight stays and being at home more often to assist his wife. However, in addition to his regular work schedule, which would have brought him home nearly every evening, he volunteered for additional shifts. Frequently he was gone from 3 in the morning until late at night and had very little time for his wife or daughter. He did not attend any counseling sessions, and even after being ordered to do so, he declined and refused to pay any child support for the benefit of Shawna. He defied the court's order by removing Shawna from the custody of his stepmother and taking her and Karin to his home in Iowa, knowing full well that Karin had resumed drinking and was a chronic alcoholic incapable of caring for the child.

In response to the court's concern for the daily care of the child, his only proposal was that Shawna now be placed with his natural mother in the state of Missouri. This would be at least the sixth foster home into which Shawna had been placed. The carelessly indifferent attitude of Dennis is strikingly similar to that of the father in the recent case of *In re Interest*

of O'Donnell, 207 Neb. 367, 299 N.W.2d 428 (1980). In that case, the father's attitude was summarized in his own words: "'See, I was brought up an old fashioned person. I go to work, I take care of the finances and she stays home and takes care of the house and kids. It's as easy as that.'" *Id.* at 371, 299 N.W.2d at 431. Dennis was at all times familiar with Karin's loneliness, her alcoholism, and her desperate need for companionship and support. He offered no support. He did not pay child support to help care for Shawna; generally, he ignored her. He now suggests that he is not at fault, that the fault lies with his former wife Karin. However, his solution to the problem does not even include establishing a home in which the child could live with her natural father. He proposes instead that she be placed in one more situation, the likes of which so far have been disastrous to her physical and mental well-being.

Dr. Agnes Gomes, a Grand Island physician, testified at the final hearing. The doctor testified that after Shawna was taken from Dennis' stepmother she showed signs of severe mental withdrawal. Shawna's physical deterioration manifested itself first by affecting Shawna's eating habits. She began to overeat and gain weight, then lost weight in spite of her huge appetite. Later, she would withdraw into a corner, bang her head against the wall, and pull large patches of hair from her head. Dr. Gomes testified that Shawna had been diagnosed as having childhood schizophrenia. Dr. Gomes' recommendation was "that Shawna should be placed permanently in her only home — so, she would not have this — right now, the thing that would bring Shawna more harm than any good — she has been moved around, and around, and around, she can not trust anybody anymore, because the minute she starts trusting somebody, she is moved around again. I feel that all this should be ended, I feel that Shawna should be placed permanently and for good, so she does not have to be moved ever again."

As we said in *State v. Jenkins*, 198 Neb. 311, 317, 252 N.W.2d 280, 284 (1977): "In this case, while there may be no direct affirmative evidence of child abuse, there is ample evidence of neglect and a lack of proper parental care directly and adversely injurious to the health, safety, and well-being of the child. Parental rights may be forfeited by substantial, continuous, and repeated neglect of a child and a failure to discharge the duties of parental care and protection. In such a case, the best interests of the child become paramount."

In determining that Dennis Kimsey's parental rights should be terminated, the county court considered that Karin Kimsey was still a chronic alcoholic, that Dennis was still in no position to care for the child by himself, that the child was in a critical physical and emotional state, and that Dennis had not had physical custody of Shawna since November 4, 1977. The court also considered the fact that two prior placements with Dennis had failed and that yet another temporary placement was contrary to the express recommendation of Shawna's physician.

"Neither are we convinced by the argument that the father of the children should not be blamed for the mother's failure as a housekeeper and mother. Both parents have the duties as described in Neb. Rev. Stat. §§ 43-201 et seq. (Reissue 1978), as well as those inherent in the parent-child relationship. A father cannot delegate those duties to the mother of his children and expect to be held harmless if she neglects the children." *In re Interest of O'Donnell, supra* at 372, 299 N.W.2d at 431.

In the 2-year period in which Shawna was in the physical custody of others, Dennis, although ordered by the court to do so, sadly neglected to attempt to correct the situation. He was indifferent toward the child and felt he could limit his obligation to care for her by continuing to work away from home and ignore the rehabilitation efforts of Karin and the well-being of

Shawna. Clearly, the county court was right in its determination to terminate Dennis' parental rights.

The judgment of the District Court is reversed and the judgment of the county court is reinstated.

REVERSED WITH DIRECTIONS.

BANK OF VALLEY, A CORPORATION, APPELLEE, V. DUANE C. SHUNK, APPELLANT.

302 N.W.2d 711

Filed March 6, 1981. No. 43160.

1. **Summary Judgment.** The moving party is not entitled to summary judgment except where there exists no genuine issue as to any material fact and where, under the facts, he is entitled to judgment as a matter of law.
2. ——. Summary judgment is an extreme remedy and should be awarded only when the issue is clear beyond all doubt. Any reasonable doubt touching the existence of a material issue of fact must be resolved against the moving party.
3. ——. Upon a motion for summary judgment the court examines the evidence not to decide any issue of fact but to discover if any real issue of fact exists. In this respect the court should take that view of the evidence most favorable to the party against whom the motion is directed, giving to that party the benefit of all favorable inferences which may reasonably be drawn from the evidence.
4. **Pleadings: Parties.** The granting of leave to file a third-party complaint is a matter entirely within the discretion of the trial court.

Appeal from the District Court for Saunders County: BRYCE BARTU, Judge. Reversed and remanded.

David J. Lanphier of McGill, Koley, Parsonage & Lanphier, P.C., for appellant.

Richard J. Butler of Ginsburg, Rosenberg, Ginsburg, Cathcart, Curry & Gordon for appellee.

Heard before BOSLAUGH, MCCOWN, CLINTON, BRODKEY, WHITE, and HASTINGS, JJ.

McCOWN, J.

The plaintiff bank brought an action against the defendant to recover principal and interest due on a promissory note. Defendant answered and also counterclaimed, alleging fraud and requesting reformation. After the taking and filing of depositions the District Court sustained plaintiff's motion for summary judgment and entered judgment against the defendant in the sum of $25,000 plus interest and costs. The defendant's counterclaim was dismissed. Defendant has appealed.

During the times relevant here Peter L. Heintzelman was the president of the plaintiff, Bank of Valley, Nebraska, and in charge of the entire operations of the bank. He was also a director of the bank and had held both positions for several years. In 1976 Heintzelman's mother died and he was appointed as a coexecutor of the estate. Acting as president of the bank and as executor of the estate, Heintzelman made loans to the estate on several occasions, and at sometime prior to November 1976 the total amount of such loans to the estate was approximately $73,000. The bank's legal loan limit to any one borrower was $75,000. On November 16, 1976, Heintzelman made an additional loan to the estate of $50,000 which made a total indebtedness of the estate to the bank of $123,000. A large portion of the proceeds of the loans to the estate were used by Heintzelman for his own personal purposes. In addition to the estate loans Heintzelman was personally indebted to the bank on his own notes in the sum of $40,000. He was also personally indebted to six other banks, five of which had common ownership with the Bank of Valley, in the sum of $140,000.

Robert Pease, vice president and director of the bank, knew that the $50,000 loan to the Heintzelman estate of November 16 exceeded the legal lending limits of the bank. At the annual meeting of the board of directors in January 1977 the board of directors

was advised of the $50,000 loan, and the matter of the loans to the estate was discussed at the board meeting. Heintzelman assured the board of directors that the amount of the bank loans to the estate would very shortly be reduced below the legal lending limit, and the $50,000 loan was approved by the board.

Shortly after the January 1977 board meeting Heintzelman contacted the defendant Shunk and inquired if he knew of anyone that would be willing to make a loan to Heintzelman. The defendant was a commercial loan customer of the bank, a favored borrower who had obtained previous loans from the bank through Heintzelman. The defendant asserts that their previous relationships had been purely on a business basis, while Heintzelman asserts that he and the defendant were good friends. Sometime later when Heintzelman again inquired of Shunk, he was advised that Don Rogert, Wilmer Mattson, and the defendant might consider the matter but needed to know more about it. Heintzelman then informed the defendant that he needed $75,000 because he was involved in the commodities market on the board of trade and that his mother's estate was not being settled as rapidly as he had anticipated and that he was having troubles with it. The defendant told Heintzelman that the three men did not have cash on hand to make any loan to Heintzelman, but that if the bank would loan them the money they would loan it to Heintzelman. Heintzelman told Shunk that the bank would be willing to make the loans to the three individuals, and that Heintzelman would give each of them his personal note in the same amount and on the same terms. The evidence is in conflict as to what representations were made by Heintzelman to the defendant to induce him and the others to sign the notes to the bank. The defendant asserts that Heintzelman told him that the $75,000 would be sufficient to clear up Heintzelman's financial difficulties; that the assets of his mother's estate would be

sufficient to secure and repay the notes; and that the three individuals would only have to pay on their notes to the bank whatever amounts Heintzelman paid on his notes to them, and that their notes to the bank would be renewed in the same fashion as any renewal of Heintzelman's notes to them.

Heintzelman denied that he had agreed that the notes of the three individuals would be extended as long as it took Heintzelman to repay them, but conceded that he had assured the defendant that the notes would be renewed if necessary on the same basis as the notes of any other preferred loan customer of the bank. Heintzelman denied that he had mentioned any collateral and denied that defendant's obligation to pay the note to the bank was tied to or connected with Heintzelman's ability to repay his note to defendant.

On February 22, 1977, the defendant Shunk and Rogert met Heintzelman at the bank. Mattson was unable to be present that day. Since Heintzelman wanted the full $75,000 at that time, Rogert signed a note to the bank for $50,000 as president of Lake Aero, Inc., and defendant signed a note to the bank for $25,000. That note is the one involved in this case. The $50,000 for Rogert's note was deposited directly into the personal checking account of Heintzelman. The $25,000 for the defendant's note was put in defendant's checking account, and the defendant wrote a personal check to Heintzelman for $25,000 which was placed in Heintzelman's personal checking account. The defendant and Rogert received notes signed by Heintzelman for $25,000 and $50,000, respectively, which had the same 1-year maturity and 8½ percent interest rates as their notes to the bank. Heintzelman wrote a check on his personal account later and paid the bank $61,000 on principal, plus accumulated interest, and credited the payment on the bank's loans to his mother's estate. Neither Shunk nor Rogert knew that the bank had loaned Heintzelman sums in excess of the bank's legal loan limit nor that any part

of the $75,000 was to be used to reduce Heintzelman's indebtedness to the bank.

The following day, February 23, 1977, Mattson went to the bank. He signed a note to the bank for $25,000, the proceeds of which were deposited in his account. Mattson then wrote a check for $25,000 on his account, leaving the payee blank and delivered the check to Heintzelman to be applied to the $50,000 Lake Aero, Inc., loan so that the defendant, Rogert, and Mattson would each have borrowed and loaned $25,000.

The vice president of the bank reported the transactions outlined above to the individual who controlled 81 percent of the bank stock but was not a director. That individual demanded Heintzelman's resignation and Heintzelman resigned as president of the bank on February 25, 1977.

In May 1978 the Bank of Valley commenced this proceeding against the defendant to recover $25,000 plus interest on his promissory note dated February 22, 1977. The defendant's answer admitted the execution of the note but denied that the note was payable under the terms and conditions set forth in the note, and alleged that any liability of the defendant to the bank had been satisfied pursuant to the facts alleged in defendant's counterclaim. The defendant also alleged that the bank was estopped from asserting liability on the note and alleged fraud arising out of the facts alleged in the defendant's counterclaim.

Defendant's counterclaim alleged that Heintzelman, as president of the bank, had made false representations to the defendant with respect to the use of the proceeds of the bank loan and the collateral therefor, and had concealed and misrepresented material facts which constituted fraudulent inducements to the defendant to execute the note to the bank and to deliver the proceeds of the note to Heintzelman. The counterclaim alleged that the bank held all available collateral as security for loans of the bank to Heintzel-

man, and had received and utilized all such collateral and received full payment on all the bank's loans to Heintzelman. It was also alleged that because of the application of that collateral, Heintzelman would never be able to pay to defendant any indebtedness represented by Heintzelman's note to defendant. The counterclaim also alleged that if the defendant were forced to pay his note to the bank, the bank would be profiting from its own wrongdoing through the acts of its president, Heintzelman. Defendant prayed for judgment reforming the provisions of the defendant's note to the bank and Heintzelman's note to the defendant to provide that defendant has no liability for payment of his note to the bank and directing that the note of Heintzelman to defendant be reformed or endorsed so that Heintzelman's indebtedness on that note would be owed directly to the bank.

The District Court sustained the plaintiff bank's motion for summary judgment, entered judgment against the defendant for $25,000 plus interest from February 22, 1977, and dismissed defendant's counterclaim.

On appeal to this court the defendant contends that the trial court erred in sustaining plaintiff's motion for summary judgment and in dismissing defendant's counterclaim because there were several genuine issues of material fact which were in dispute. The defendant also contends that the trial court erred in entering orders limiting the defendant's discovery, and also erred in overruling defendant's motion for leave to file a third-party petition against the board of directors of the bank.

This court has consistently held that the moving party is not entitled to summary judgment except where there exists no genuine issue as to any material fact and where, under the facts, he is entitled to judgment as a matter of law. Neb. Rev. Stat. § 25-1332 (Reissue 1979).

Summary judgment is an extreme remedy and

should be awarded only when the issue is clear beyond all doubt. Any reasonable doubt touching the existence of a material issue of fact must be resolved against the moving party. *Clemens Mobile Homes, Inc. v. Guerdon Industries, Inc.*, 199 Neb. 555, 260 N.W.2d 310 (1977).

Upon a motion for summary judgment the court examines the evidence not to decide any issue of fact but to discover if any real issue of fact exists. In this respect the court should take that view of the evidence most favorable to the party against whom the motion is directed, giving to that party the benefit of all favorable inferences which may reasonably be drawn from the evidence. If, when so viewed, reasonable men might reach different conclusions, the motion should be denied and the case tried on its merits. *Farro v. Rubottom*, 202 Neb. 120, 274 N.W.2d 149 (1979).

On the record here there are apparent factual disputes as to whether Heintzelman had made fraudulent representations or engaged in fraudulent conduct and, if so, in what capacity. There are also issues of fact as to whether the various transactions were separate and distinct transactions or part of a single plan or scheme, and issues of fact as to whether the transactions were undertaken for the benefit of the bank or only for the personal benefit of Heintzelman. Under such circumstances, summary judgment was inappropriate, both with respect to the principal cause of action as well as to the designated counterclaim which alleged a possible defense to the note.

The defendant also contends that the District Court erred in denying defendant's motion to require plaintiff to produce various documents relating to the bank's dealings with and loans to Heintzelman, including the timing and scope of those dealings, and correspondence and documents submitted by the bank to the State Department of Banking in connection with excess limit loans to Heintzelman or the Heintzelman estate.

Generally, discovery should be allowed regarding any nonprivileged matter which is relevant to the subject matter involved in the pending action. See Neb. Rev. Stat. §§ 125-1267.01 et seq. (Reissue 1979). Ordinarily, the purpose and intent of discovery statutes is to leave their application to the sound discretion of the trial court. See *Haarhues v. Gordon*, 180 Neb. 189, 141 N.W.2d 856 (1966). Where the information sought is relevant it may be at least premature for the trial court to limit a party's discovery and then grant an opposing party's motion for summary judgment. Where issues of fraud are pleaded and the facts sought to be discovered may be directly relevant and material, discovery should ordinarily be permitted.

Defendant also complains that the District Court overruled defendant's application to file a third-party complaint against the individual directors of the plaintiff bank. The granting of leave to file a third-party complaint is a matter entirely within the discretion of the trial court. *Northwestern Bell Tel. Co. v. Woodmen of the World Life Ins. Soc.*, 189 Neb. 30, 199 N.W.2d 729 (1972). In the case at bar, no showing of prejudice is made nor is the defendant prevented from litigating in an appropriate forum the possible liability of the bank's directors. We find no abuse of discretion.

The judgment of the District Court is reversed and the cause is remanded to the District Court for further proceedings in accordance with this opinion.

REVERSED AND REMANDED.

KRIVOSHA, C.J., not participating.

CLINTON, J., dissenting.

I respectfully dissent from the majority opinion.

The evidence before the court on the motion for summary judgment shows without any contradiction that the defendant Shunk was not in any way deceived when he borrowed money from the bank on the note in suit and in turn loaned the money to Heintzelman,

taking Heintzelman's note in consideration of the loan to himself. The evidence shows that he knowingly made a personal loan to Heintzelman because Heintzelman was in financial difficulty. Shunk himself suggested that he would make the personal loan which Heintzelman had requested, if the bank would lend the money. The evidence shows, also without contradiction, that Shunk knew from Heintzelman himself that the latter was in financial difficulty. In fact, Shunk's counterclaim alleges: that he (Shunk) was informed by Heintzelman that the latter needed "$75,000.00 to clear up his difficulties with an estate, with Bank President's [Heintzelman] brother *and to clear up debts at bank.*" (Emphasis supplied.) The pleadings contain no allegation that Shunk relied upon any representation by Heintzelman that the latter's indebtedness to the bank was within lawful loan limits.

The evidence shows that whatever representations Heintzelman made, he was making them on his own behalf. It further shows that Shunk was relying upon Heintzelman to pay him and not upon the bank. The only allegation in the counterclaim relative to Heintzelman's liability to the bank being in excess of loan limits is simply that this fact was unknown to Shunk.

There is no evidence in the record which tends to show that Heintzelman, in requesting the loans to himself, was acting on behalf of the bank and in the course and authority of his employment with the bank.

A bank officer, in negotiating a loan from a third party on his own behalf, is not acting within the scope of his authority as a bank officer and his acts do not bind the bank. *Farmers Nat. Bank v. Ohman*, 112 Neb. 491, 199 N.W. 802 (1924); *Cozad State Bank v. McLaughlin*, 128 Neb. 87, 258 N.W. 36 (1934); *Schwenker v. Teasdale*, 206 Wis. 275, 239 N.W. 434 (1931). There is no evidence that Heintzelman was acting on behalf of the bank in arranging his personal loan so that he could pay the bank.

The defect in the majority opinion is that it does not analyze the pleadings in terms of the essential element of fraud, nor the evidence submitted in connection with the motion for summary judgment to determine whether there are any *material facts in dispute* on the issue of the alleged fraud of the bank; rather, it assumes the materiality.

Shunk also complains that the court erred in limiting discovery by sustaining objections to certain interrogatories. An examination of the interrogatories to which objection was sustained indicates that they are not relevant or material to the proof of any issue in the case, or likely to lead to any such evidence.

I would affirm the judgment of the trial court.

JERRY GRAVES ET AL., APPELLEES, V. GEORGE GERBER ET AL., APPELLANTS.

302 N.W.2d 717

Filed March 6, 1981. No. 43173.

1. **Easements.** Where an easement such as a right-of-way is granted without fixing its exact location, the location may be subsequently fixed by express agreement between the parties, or by an implied agreement arising out of the use of a particular way.
2. ——. The failure of a grant to definitely locate an easement does not give the grantee the right to use the servient estate without limitation. In such a case the grantor may designate the location, and if he fails to do so the grantee may then make the designation which, in either case, must be reasonable.
3. **Easements: Equity.** Under certain circumstances, a court of equity may fix the location of a way which the grant does not specifically describe.
4. **Equity: Jurisdiction.** It is a general rule of equitable jurisdiction that where a court has assumed jurisdiction it will retain it for all purposes connected with the principal controversy.
5. **Easements.** The use of an easement existing by an express grant must be confined to the terms and purposes of the grant.
6. ——. An easement of necessity does not arise from an express grant, but is an easement arising either by implied grant or reservation. Such implied easements ordinarily arise in cases where the land owned by

one entity is divided by sale of a portion and the beneficial use of one tract or the other depends on an easement for ingress or egress or other purpose.

Appeal from the District Court for Hall County: JOSEPH D. MARTIN, Judge. Affirmed in part and remanded with directions.

James H. Truell for appellants.

No appearance for appellees Graves.

Heard before KRIVOSHA, C.J., BOSLAUGH, MCCOWN, CLINTON, BRODKEY, WHITE, and HASTINGS, JJ.

CLINTON, J.

This is an action by the plaintiffs Graves for a mandatory injunction requiring the defendants Gerber to remove a stockade-type fence which Gerber erected upon his own residential property adjacent to the west lot line of the Graves residential lot. The basis of the suit is that the fence interferes with the use of an easement arising from a grant made by the Gerbers' predecessors in title to Graves' predecessors in title, giving to the owner of the Graves property, or the dominant tenement, the use of a portion of the Gerber property, or the servient tenement, as a means of ingress and egress to the Graves garage located on the rear of the Graves lot. The trial court ordered the fence be removed. Gerber appeals. We affirm in part and remand with directions to amplify the decree.

Gerber defends primarily on the basis that the fence does not prevent ingress and egress because, in constructing the fence, he left a 16-foot opening through which Graves' vehicles may pass in going to and from the garage.

An understanding of the issues will be facilitated by an explanation of the physical layout of the property and the ownership history, as well as the specific language of the easement.

As we have noted, both properties are residential. Located on each lot is a single-family residence and

a garage. Each house is set back from the front lot line about the same distance. Both residences face the north and abut on the south line of West Koenig Street in the city of Grand Island. The Graves property is Lot 1 of the block in which it is located. The Gerber property is Lot 2 of the same block and abuts the Graves property on the west. The garages are detached. The Graves garage lies in the southwest portion of the lot and the Gerber garage in the southeast corner of the lot, both adjacent to the alley. Each lot has a paved, concrete driveway running from the street to its respective garage. The driveways lie between the two houses and abut at the common lot line. Thus, the fence divides the two driveways except for a 16-foot gap located south of the two houses. The west edge of the Gerber driveway lies about 2 or 3 feet from the Gerber residence. The east edge of the Graves driveway abuts the residence itself. The Gerber driveway is 9 feet in width and the Graves driveway appears to be about the same width. The Graves driveway is partially obstructed by a landing and stairway which afford entry to a side entrance on the west side of the Graves house located about the center of the building. This landing and stairway appear to be approximately 4 feet in width. To the south of and behind the landing and located on the concrete drive is an air-conditioning unit.

In order for a vehicle to use the Graves driveway to leave or enter the Graves garage, it must drive around the obstructions and in so doing pass upon a portion of the Gerber driveway. Although there is no specific testimony on the point, there is a clear inference from the evidence that the existing obstruction was the reason for granting the easement.

The evidence shows that the Graves acquired their property in June 1975. Gerbers purchased their property 2 years earlier. Both had actual as well as constructive notice of the easement. The grant of the easement, which was executed in 1965, is indefinite

as to the location of the easement. The operative language is as follows:

"WHEREAS, it is necessary that the party of the second part traverse a portion of the property owned by the parties of the first part, in entering and exiting from a garage located on the property of the party of the second part,

"IT IS MUTUALLY AGREED that the parties of the first part, their heirs and assigns, hereby grant a right of way over that portion of their property to the party of the second part, for said purposes of moving vehicles to and from the garage on the property of the party of the second part.

"Said easement is granted by the parties of the first part perpetually and is to run with the land."

There is no testimony as to how the easement was used in practice by Graves' precedessors in title. There is no evidence that the original grantor or any of the mesne grantors prescribed the easement boundaries.

Graves' testimony concerning how he used the easement was as follows:

"A. We pulled off Koenig Street and go into my driveway and then around the side of the house over onto the other property to get to the back of the garage, behind the house.

"Q. Did you do this in one continuous motion?

"A. Yes.

"Q. Was your garage fully accessible for you to enter into then?

"A. Yes."

He then described how the fence interfered with that use. This was especially true in backing from the garage out to the street. He testified:

"A. . . . Also, you got to be extremely careful when you turn in that you don't catch the side of the pickup or the van on both vehicles.

"Q. Now, can you do this in both vehicles in a continuous motion?

"A. I cannot do it with the pickup, no.

"Q. What do you have to do?

"A. I have to stop with that pickup and kind of jockey around so I can get into the garage. Backing out is worse.

"Q. What happens when you leave the garage?

"A. Okay. Both vehicles I have to stop in the opening and I have to go forward and then back up again. I cannot do it in one continuous motion. The pickup, I can't do it. It's just too close. The Trail Duster, I can if I stop and pull forward and then back up again." Sometimes, in so doing, he would inadvertently back off the west edge of Gerber's driveway onto the unpaved ground.

Photographic views of the fence and the driveway indicate that the fence would prevent Graves from driving from a parked position on the portion of his driveway near the front of his house directly to the garage. He would first have to back at least part way into the street before moving forward and then do so entirely on the Gerber driveway.

Gerber, among other things, argues that the easement was one of necessity and that Graves can enter and leave the garage through the alley in any event. He also asked the court for affirmative relief by praying that he be permitted to place a gate in the 16-foot gap, which Graves could close and open as he pleased.

Gerber, in his testimony, complained that visitors at the Graves home parked in the Gerber driveway, thus blocking his access to his drive and garage. In cross-examination of Graves, it was disclosed that in order to use the easement, he sometimes removed snow from his side "over onto the easement side, also." The implication is that this resulted in piling snow on Gerber's driveway.

Gerber also justified the erection of the fence because the noise of the air-conditioner disturbed him and his family in the use and possession of their home and that the fence would reduce that noise, and also be-

cause the fence would prevent accidents such as once occurred when his car collided with the parked Graves car while backing out on the slippery driveway.

This is an action in equity and is tried de novo in this court. The principles which govern its disposition, we believe, are the following: Where an easement such as a right-of-way is granted without fixing its exact location, the location may be subsequently fixed by express agreement between the parties, or by an implied agreement arising out of the use of a particular way. *Ingelson v. Olson*, 199 Minn. 422, 272 N.W. 270 (1937); *Capital Elec. Power Assn. v. Hinson*, 226 Miss. 450, 84 So. 2d 409 (1956); *United States v. Felix O'Neill, Inc.*, 144 F. Supp. 292 (E.D. Pa. 1956); *Keesling v. Seattle*, 52 Wash. 2d 247, 324 P.2d 806 (1958); *Bruns v. Willems*, 142 Minn. 473, 172 N.W. 772 (1919); *Burnham v. Mahoney*, 222 Mass. 524, 111 N.E. 396 (1916); 28 C.J.S. *Easements* § 82, p. 761. See, also, *Fischer v. Grinsbergs*, 198 Neb. 329, 252 N.W.2d 619 (1977).

The failure of a grant to definitely locate an easement does not give the grantee the right to use the servient estate without limitation. In such a case the grantor may designate the location, and if he fails to do so the grantee may then make the designation which, in either case, must be reasonable. *Ingelson v. Olson, supra;* 28 C.J.S. *Easements* § 79, p. 759.

Under certain circumstances, a court of equity may fix the location of a way which the grant does not specifically describe. *Ingelson v. Olson, supra; Graff v. Budgett*, 69 S.D. 364, 10 N.W.2d 764 (1943); 28 C.J.S. *Easements* § 83, p. 762.

It is a general rule of equitable jurisdiction that where a court has assumed jurisdiction it will retain it for all purposes connected with the principal controversy. *Daugherty v. Ashton Feed & Grain Co., Inc.*, *ante* p. 159, 303 N.W.2d 64 (1981); *Hull v. Bahensky*, 196 Neb. 648, 244 N.W.2d 293 (1976); *Northwestern Mut. Life Ins. Co. v. Nebraska Land Corp.*, 192 Neb.

588, 223 N.W.2d 425 (1974); *State ex rel. Beck v. Associates Discount Corp.*, 162 Neb. 683, 77 N.W.2d 215 (1956).

The use of an easement existing by an express grant must be confined to the terms and purposes of the grant. 28 C.J.S. *Easements* § 87, p. 765.

An easement of necessity does not arise from an express grant, but is an easement arising either by implied grant or reservation. Such implied easements ordinarily arise in cases where the land owned by one entity is divided by sale of a portion and the beneficial use of one tract or the other depends on an easement for ingress or egress or other purpose. 28 C.J.S. *Easements* §§ 30-40, p. 686 et seq.

The evidence discloses that the fence interferes with the easement as established by Graves' use for a prolonged period of time. The trial court was clearly correct in directing that the fence be removed, at least as to that portion lying north of the gap. The evidence does not establish that the noise of the air-conditioner was such as to unreasonably interfere with the use of the Gerber property.

The easement plainly is not one arising by implication from necessity.

The easement must be limited to the use as established in practice. Graves' vehicles must enter on his own driveway and remain there until it is necessary to drive onto the Gerber drive to safely pass the obstructions. The vehicles must then return to the Graves drive. This same path should also be followed in making exit to the street. The owners of the dominant tenement in removing snow from their own drive and from the portion of the drive subject to the easement shall pile none of it on the servient tenement. The servient tenement shall not be used for the parking of vehicles by the owners of the dominant tenement or their visitors.

The trial court should again view the premises to determine whether the removal of the fence south of

the gap is required by the established use.

The judgment is affirmed in part and the cause remanded for entry of an amplified decree in accordance with this opinion.

AFFIRMED IN PART AND
REMANDED WITH DIRECTIONS.

LINDA ESBENSHADE, APPELLANT, V. NATIONAL LIFE INSURANCE COMPANY, A CORPORATION, APPELLEE.

303 N.W.2d 272

Filed March 6, 1981. No. 43175.

1. **Directed Verdict.** The party against whom a verdict is directed is entitled to have every controverted fact resolved in his favor and to have the benefit of every inference that can reasonably be deduced from the evidence. It is only when the facts are conceded, undisputed, or are such that reasonable minds can draw but one conclusion therefrom that the trial court must decide the question as a matter of law and not submit it to a jury.
2. **Juries: Negligence.** Where different minds may reasonably draw different conclusions from the evidence as to whether or not they establish negligence, the issues are for the jury.
3. **Directed Verdict.** It is a well-established rule that if there is any evidence which will sustain a finding for the litigant having the burden of proof in a cause, the trial court may not disregard it and decide the case as a matter of law.

Appeal from the District Court for Douglas County: JERRY M. GITNICK, Judge. Reversed and remanded with directions.

William Jay Riley of Fitzgerald, Brown, Leahy, Strom, Schorr & Barmettler for appellant.

John R. Douglas and Ronald F. Krause of Cassem, Tierney, Adams, Gotch & Douglas for appellee.

Heard before KRIVOSHA, C.J., BOSLAUGH, MCCOWN, CLINTON, BRODKEY, and WHITE, JJ.

KRIVOSHA, C.J.

The appellant, Linda Esbenshade (Ms. Esbenshade), appeals from an order entered by the District Court for Douglas County, Nebraska, sustaining a motion for directed verdict made by the appellee, National Life Insurance Company (National Life), at the close of Ms. Esbenshade's case in chief. We believe that the evidence introduced as a part of Ms. Esbenshade's case in chief raised legitimate questions of fact which should have been submitted to the jury for its determination. We therefore reverse and remand this action for further proceedings.

Ms. Esbenshade and her husband leased an apartment from National Life, which was one of many units located in a multibuilding apartment complex owned by National Life, in Millard, Nebraska. Early in the morning of December 27, 1977, Ms. Esbenshade left her apartment unit, intending to walk to her parked car for the purpose of starting it and "warming it up" in anticipation of using it a little later in the morning.

According to Ms. Esbenshade's version of the facts, she chose what appeared to be the least hazardous route across an open common yard area of the apartment unit maintained by National Life. The area led to the parking lot where her car was located. Her evidence established that as she left her apartment building through the only practical means of ingress and egress, she observed that the sidewalk leading to the parking area was visibly slick with a thin sheet of ice covering most of the walkway.

Ms. Esbenshade's evidence tended to establish that the hazard posed by the ice upon the sidewalk was increased by reason of the fact that a portion of the walk she needed to cross to reach the parking lot consisted of a humped concrete bridge spanning a drainage ditch. The humped span, also covered with ice, had no handrails of any type. After warming up her car,

she returned to her apartment unit, again crossing the interior common yard area of the apartment unit.

National Life, as landlord, maintained all of the sidewalks and the common areas of the apartment unit. As landlord, National Life had also planted a 4-foot-high pine tree in the yard area near the sidewalk directly between the entrance of Ms. Esbenshade's apartment building and the parking lot. Attached to the tree were wires that extended 2½ to 3 feet beyond the end of the pine tree branches. The wires were attached to stakes in the ground. The wires were not flagged or in any other way marked or identified, and residents were not otherwise warned about the presence of the wires except to the extent that they might actually have seen them on previous occasions.

In returning to her apartment unit from the parking lot, Ms. Esbenshade fell over one of the guy wires, striking her knee and shattering her patella. As a result of her fall, Ms. Esbenshade was forced to undergo surgery, resulting in the removal of her kneecap. In addition to the loss of her kneecap, she suffered pain, actual loss of wages, and incurred medical expenses.

Ms. Esbenshade maintained that she was unaware of the presence of the guy wires and did not see them on the morning in question because of the absence of adequate light, either natural or artificial. As we have already indicated, the trial court sustained the motion for a directed verdict made by National Life following Ms. Esbenshade's case in chief, and dismissed her petition.

Ms. Esbenshade claims that the issues raised by her evidence involved questions of fact so that the trial court erred in sustaining the motion for directed verdict. The determination of that question depends, in part, upon certain rules heretofore announced by us in reviewing the granting of a directed verdict.

In the recent case of *Foremost Ins. Co. v. Allied*

Financial Services, Inc., 205 Neb. 153, 158, 286 N.W.2d 740, 744 (1980), we said: "It is well settled law in this state that the party against whom a verdict is directed is entitled to have every controverted fact resolved in his favor and to have the benefit of every inference that can reasonably be deduced from the evidence. It is only when the facts are conceded, undisputed, or are such that reasonable minds can draw but one conclusion therefrom that the trial court must decide the question as a matter of law and not submit it to a jury. [Citations omitted.] It is also the rule that to justify the direction of a verdict, it is not necessary that there should be literally no evidence to go to the jury, it being sufficient that there is none that ought reasonably to satisfy the jury that the fact sought to be proved is established." (Emphasis omitted.) Likewise, in *Taylor v. J. M. McDonald Co.*, 156 Neb. 437, 440, 56 N.W.2d 610, 612 (1953), we said: "[W]here different minds may reasonably draw different conclusions from the evidence as to whether or not they establish negligence, the issues are for the jury." In *Hickman v. Parks Construction Co.*, 162 Neb. 461, 470, 76 N.W.2d 403, 410 (1956), we said: "It is a well-established rule that if there is any evidence which will sustain a finding for the litigant having the burden of proof in a cause the trial court may not disregard it and decide the case as a matter of law." And we noted in *Presho v. J. M. McDonald Co.*, 181 Neb. 840, 844, 151 N.W.2d 451, 455 (1967): "[N]egligence and a duty to use due care does not exist in the abstract, but must be considered against the particular set of facts and circumstances."

The first question which we must therefore address in reviewing the action of the trial court in this case is whether the evidence presented by Ms. Esbenshade, viewed most favorably in support of her position, is such that reasonable minds could reach only the conclusion that National Life was not in any manner negligent or that Ms. Esbenshade was so contributorily

negligent as to bar her recovery as a matter of law. For, if reasonable minds can dispute about the conclusion to be reached in this case, a directed verdict would be inappropriate.

The rules of law concerning the liability of a landlord in this case are relatively clear, though the application of the rules have consistently given us difficulty. Restatement (Second) of Torts § 342 (1965) provides: "A possessor of land is subject to liability for physical harm caused to licensees by a condition on the land if, but only if, (a) the possessor knows or has reason to know of the condition and should realize that it involves an unreasonable risk of harm to such licensees, and should expect that they will not discover or realize the danger, and (b) he fails to exercise reasonable care to make the condition safe, or to warn the licensees of the condition and the risk involved, and (c) the licensees do not know or have reason to know of the condition and the risk involved."

Our holdings have generally been in accord with Restatement's position. In *Markussen v. Mengedoht*, 132 Neb. 472, 475, 272 N.W. 241, 243 (1937), we acknowledged the Restatement rule, saying: "[T]he owner, who reserves a portion of the demised premises for the common use of all the tenants, is required to keep the portion so reserved in a reasonably safe condition . . . ." And, again, in *Schwab v. Allou Corp.*, 177 Neb. 342, 347, 128 N.W.2d 835, 839 (1964), we said: "'[A] lessor is bound to exercise reasonable care in keeping premises used in connection with but not demised to the lessee reasonably safe for those having lawful occasion to use them for the purpose for which they were intended.'"

An examination of a series of cases decided by this court discloses that evidence similar to the type presented to the trial court in this case has led this court to conclude that questions of fact were, indeed, raised which should have been submitted to the jury. In *Swiler v. Baker's Super Market, Inc.*, 203 Neb. 183, 277 N.W.2d

697 (1979), we were asked to review a case involving a plaintiff who tripped upon a floormat and fell in the defendant's store while there to make a purchase. In concluding that a question of fact was raised, we said at 185-86, 277 N.W.2d 699-700: "In determining the question of whether the evidence is sufficient to submit the issues of negligence and contributory negligence to the jury, a party is entitled to have all conflicts in the evidence resolved in her favor and the benefit of every reasonable inference that may be deduced from the evidence, and if reasonable minds might draw different conclusions from a set of facts thus resolved in favor of a party, the issues of negligence and contributory negligence are for the jury. Pearson v. Richard, 201 Neb. 621, 271 N.W.2d 326. This court said in the Pearson case that: 'Negligence is a question of fact and may be proven by circumstantial evidence and physical facts.'"

In *Taylor v. J. M. McDonald Co.*, 156 Neb. 437, 56 N.W.2d 610 (1953), we determined that it was a question of fact whether the defendant store was negligent in permitting gum to remain on the store floor, thereby causing the plaintiff to catch her heel and fall to the floor.

In *Hickman v. Parks Construction Co.*, 162 Neb. 461, 76 N.W.2d 403 (1956), we held that it was a question of fact to be determined by the jury as to whether the defendant construction company was negligent in leaving an excavation in such condition that the plaintiff, while attempting to cross the parking lot to his automobile, fell into the excavation.

In *Schwab v. Allou Corp.*, *supra*, we held that it was a question of fact as to whether the landlord was negligent in failing to remove the ice from the front porch and the plaintiff contributorily negligent in walking across the ice when there was no other means of ingress or egress.

In *Crosswhite v. City of Lincoln*, 185 Neb. 331, 175 N.W.2d 908 (1970), we held it to be a question of fact

to be determined by the jury as to whether the city and the abutting property owner were negligent in permitting a water stop box to remain elevated above the sidewalk, thereby causing the plaintiff to trip over the stop box when attempting to cross the sidewalk.

And in *Tempel v. Proffitt*, 122 Neb. 249, 240 N.W. 285 (1932), we held it was a question of fact to be determined by the jury as to whether defendant-landlord was negligent in maintaining certain stairs upon which the plaintiff fell.

To be sure, the landlord may not always be held liable. The landlord is not liable to a tenant for injuries sustained in a common area where the danger is inherent and the conditions complained of are open, obvious, and apparent to the injured party. See, *Good v. Jones*, 184 Neb. 454, 168 N.W.2d 520 (1969); *Crawford v. Soennichsen*, 175 Neb. 87, 120 N.W.2d 578 (1963); *Whitcomb v. State Fed. Sav. & Loan Assn.*, 190 Neb. 26, 205 N.W.2d 652 (1973).

We need not, however, and, in fact, do not, find by our decision herein that National Life was in fact negligent in any respect. That conclusion, being a question of fact under the circumstances, we leave for the triers of fact — the jury. We only decide here either that National Life was not wholly free of negligence as a matter of law or that Ms. Esbenshade was not guilty of contributory negligence sufficient to bar recovery as a matter of law. Therefore, National Life was not entitled to a directed verdict. Our conclusion reached herein is clearly required under the law and the facts presented.

Whether National Life exercised the ordinary care required of a landlord when extending the guy wires several feet beyond the tree must of necessity be a question of fact. The answer to that question depends upon the view which the jury takes of the evidence offered by Ms. Esbenshade. Did she know of the presence of the wire? She maintains she did not.

Did National Life know that persons, including tenants, used the common area to walk upon and to get to their cars? Ms. Esbenshade maintains it did. Could the wire be seen either day or night without other warnings being given by National Life or other steps taken by it to protect users of the common area, including the tenants? Ms. Esbenshade maintains that the light was insufficient. The jury might conclude to the contrary. That is not, however, a question of law but, rather, a question of fact.

National Life argues that no reasonable mind could reach a conclusion that National Life was negligent under the facts and the law in this case. We do not believe that to be true. As we have noted earlier in our opinion, reasonable minds have reached contrary views as noted in the cases cited herein.

Likewise, other jurisdictions which have reviewed actions of this very type have concluded that reasonable minds might reach contrary conclusions as to the facts of the matter, thereby making the action properly one which should be submitted to a jury for their determination.

In the case of *Blaustein v. Levitt*, 24 App. Div. 2d 862, 264 N.Y.S.2d 318 (1965), the Supreme Court of New York, Appellate Division, Second Department, was asked to rule upon an action brought by the plaintiff to recover damages for personal injury sustained by the plaintiff when he attempted to cross a 6-foot-wide island situated between the place in the parking lot where he had parked his car and the entrance to the apartment house owned by defendant, in which house plaintiff was a tenant.

In affirming the judgment of the jury finding for the plaintiff-tenant and against the defendant-landlord, the court said at 862, 264 N.Y.S.2d at 319: "Planted in the center of the 'island' was a young tree about 4 or 5 feet high from which a wire was stretched from a height of 2½ to 3 feet to a peg about 2 or 2½ feet away. In attempting to cross the island, plaintiff

tripped on the wire, which was invisible to him on this rainy night in this unlighted area. The jury could find that defendant had the duty to anticipate that a person parking his car in the parking area would attempt to get to the entrance of the apartment house in which he was a tenant directly from the parking lot on the far side of the island, rather than to go around the island [citation omitted]. Contributory negligence was a question of fact."

Likewise, in *Laufer v. Long Island Lighting Co.*, 61 App. Div. 2d 977, 402 N.Y.S.2d 611 (1978), the same court was asked to review a negligence action to recover damages for personal injury resulting when the plaintiff fell over a guy wire extending from a telephone pole. The New York court said at 977-78, 402 N.Y.S.2d at 612: "The New York Telephone Company erected a telephone pole in the grassy area between a concrete sidewalk and the curb. It attached a cable guy wire to the pole and, in order to stabilize the pole, anchored the guy wire in the grassy area. During the evening of May 4, 1976, plaintiff and three friends attempted to cross the street in the middle of the block. Plaintiff was apparently speaking with and looking at one of his friends when he tripped over the guy wire. He testified at the trial that he did not realize what he had tripped over until he had gotten up from the ground and looked about. Plaintiff and Kevin Valentine testified that it had been very dark at the time of the accident. Only the middle of the street had been illuminated; the guy wire was not visible. . . . In view of the darkness and the dark color of the guy wire, it would have been difficult for plaintiff to ascertain the cause of his fall, while falling. Under the circumstances, only when he had gotten up and searched for the cause of the accident could plaintiff have determined what had made him fall. Had he observed the wire before the accident, and yet fallen over it, a jury might have found that his own negligence had proximately caused the accident. There was no

testimony as to the presence of any other object at the location. A jury could find that plaintiff did not trip over the curb, as the guy wire obstructed the path to the street; plaintiff would have had to pass the guy wire before reaching the curb. Plaintiff's testimony as to having tripped over something may exclude the possibility of his having fallen over his own two feet. We find that plaintiff made out a prima facie case. The questions of fact should be decided by a jury . . . ."

And in the case of *Jablonski v. City of Bay City*, 248 Mich. 306, 226 N.W. 865 (1929), the Michigan Supreme Court held that it was a question of fact as to whether the city was negligent in placing a wire along the edge of a sidewalk over which the plaintiff tripped. In so holding the Michigan Supreme Court said at 310-12, 226 N.W. at 866-67: "Such departure from the sidewalk is not negligence *per se* in the individual, nor does it relieve the city of the duty to keep its streets in proper condition for travel at the places where people may reasonably be expected probably to walk.

. . . .

"The essential question is whether the guard is a reasonable one. . . . [A]nd the question of whether it was a proper guard or a dangerous instrumentality resulting in a breach of the statutory duty of the city would be for a jury."

In view of all of these cases brought to our attention, we are unable to see how we can conclude that reasonable minds could reach but one conclusion under the facts in this case. We must, therefore, conclude that reasonable minds could differ under the circumstances. Reaching that conclusion, we must, likewise, acknowledge that there were legitimate questions of fact which should have been presented to a jury under proper instructions at the proper time, thereby making the sustaining of a motion for directed verdict improper.

What we have said concerning the issue of National Life's alleged negligence can likewise be said about

Ms. Esbenshade's alleged contributory negligence. Does the evidence establish that Ms. Esbenshade did not use "ordinary care" for her own safety? Did she know about the presence of the guy wire and could she have seen the guy wire before she fell over it? Did she place herself in a dangerous position when other, more reasonable and less dangerous alternatives were available? We cannot answer those questions as a matter of law. They might reasonably be decided either way by reasonable minds. The answer to those questions under the evidence must, therefore, be questions of fact to be decided by the jury.

We therefore reverse the action of the trial court in dismissing plaintiff's petition, and remand for further proceedings in accordance with this opinion.

REVERSED AND REMANDED WITH DIRECTIONS.

MCCOWN, J., concurs in result.

CLINTON, J., dissents.

BOSLAUGH, J., dissenting.

According to the majority opinion, the evidence in this case would sustain a finding that the defendant had created a condition involving unreasonable risk of harm to the plaintiff and the plaintiff did not know or have reason to know of the condition and risk of harm.

The evidence is that the tree had been planted 1 to 5 months before the accident and the plaintiff had walked past it many times. In her deposition, the plaintiff testified that at one time or another she had "probably noticed" or "observed" the wires and stakes supporting the tree. There was nothing concealed or hidden about the wires and stakes, although the wires would not be easily seen when it was dark.

The majority opinion relies upon Nebraska cases involving dangerous conditions on floors in grocery and department stores; stairways and porches of apartment houses; excavations in parking lots; and elevated

stop boxes in sidewalks. It should be readily apparent that none of these cases has any application to the facts in this case.

DUKANE CORPORATION, APPELLANT, V. SIDES CONSTRUCTION COMPANY AND SAFECO INSURANCE COMPANY OF AMERICA, APPELLEES.

302 N.W.2d 721

Filed March 6, 1981. No. 43176.

1. **Mechanics' Liens: Bonds: Contractors and Subcontractors.** The purpose of Neb. Rev. Stat. § 52-118 (Reissue 1978) is to secure payment to those furnishing labor, material, and equipment rental in the construction or repairing of any public building, structure, or improvement where the general provisions of the mechanic's lien laws do not apply.
2. **Mechanics' Liens: Contractors and Subcontractors.** Where the general mechanic's lien laws are applicable the lien of a materialman for materials furnished for the erection of a building by virtue of an agreement with the contractor extends to such materials only as are used in or delivered at the building for use therein.
3. **Bonds: Principal and Surety: Words and Phrases.** Within the meaning of a payment bond which imposed the duty to pay for labor and materials "used or reasonably required for use in the performance of the contract," the phrase "reasonably required for use" was no more than a clause protecting the surety from excessive and unreasonable claims.

Appeal from the District Court for Douglas County: JOHN C. BURKE, Judge. Affirmed.

Eugene L. Pieper of Thompson, Crounse & Pieper for appellant.

Waldine H. Olson of Schmid, Ford, Mooney & Frederick for appellees.

Heard before KRIVOSHA, C.J., BOSLAUGH, MCCOWN, CLINTON, BRODKEY, WHITE, and HASTINGS, JJ.

MCCOWN, J.

The plaintiff brought this action against the general contractor and its bonding company to recover on a

labor and material payment bond for materials furnished to a subcontractor whose contract was canceled. Following discovery, both parties filed motions for summary judgment. The District Court granted defendants' motion for summary judgment and dismissed plaintiff's petition.

On October 26, 1977, Sides Construction Company, as general contractor, entered into a construction contract with Bellevue school district to renovate Bellevue East High School. Sides Construction Company entered into a subcontract with Hy-Gain Electronic Systems Corporation on November 14, 1977, under which Hy-Gain was to furnish all plant labor, equipment, and materials necessary to revise the clock and program system for the school renovation. In November and December of 1977 Hy-Gain ordered various materials from Dukane Corporation, the plaintiff, which were apparently to be used by Hy-Gain in connection with its subcontract. The materials were all shipped to Hy-Gain in Lincoln, Nebraska, except for some "back boxes" which were mistakenly delivered to Sides Construction Company rather than Hy-Gain. None of the materials were ever delivered to the job site in Bellevue, Nebraska, nor used by Sides, nor incorporated into the job.

On January 13, 1978, Sides received an invoice from Hy-Gain for certain unspecified "equipment" for the school job which was identified as being located in Hy-Gain's warehouse. In January 1978 Hy-Gain filed a Chapter XI petition for a bankruptcy arrangement in the U.S. District Court for Nebraska.

After receiving Hy-Gain's invoice in January 1978, and throughout February and March of 1978, Sides attempted to locate and secure delivery of the materials through numerous phone calls to Hy-Gain and the plaintiff. Being unable to obtain delivery of the materials, Sides canceled the Hy-Gain contract by letter dated April 7, 1978.

In order to complete the school job, Sides issued a

new subcontract to Electronic Contracting Company on June 9, 1978, for a stipulated contract price of $20,800. Electronic furnished the materials and completed the new subcontract and has been fully paid by Sides.

On February 14, 1979, plaintiff filed its petition against Sides and Safeco to recover the sum of $12,708.95 for the materials that remained in the possession of Hy-Gain and which were not furnished to the job site nor used in the performance of the contract. The District Court entered summary judgment for the defendants and the plaintiff has appealed.

The bond in the present case is a statutory bond required to be furnished in connection with any contract for the erecting or repair of any public building or structure where the general provisions of the mechanic's lien laws do not apply and where the mechanics, laborers, and materialmen have no lien to secure payment for labor, material, and equipment. The relevant portions of Neb. Rev. Stat. § 52-118 (Reissue 1978) require all public boards "to take from the person, persons, firm, or corporation to whom the contract is awarded a bond, in a sum not less than the contract price, with a corporate surety company, conditioned for the payment of all laborers and mechanics for labor that shall be performed and for the payment for material and equipment rental which is actually used or rented in the erecting, furnishing, or repairing of the public structure or improvement or in performing the contract."

The bond in this case is conditioned to make prompt payment to all claimants as defined, "for all labor and material used or reasonably required for use in the performance of the Contract." The bond also provides: "A claimant is defined as one having a direct contract with the Principal or with a Subcontractor of the Principal for labor, material, or both, used or reasonably required for use in the performance of the Contract, labor and material being construed to include that part of water, gas, power, light, heat, oil,

gasoline, telephone service or rental of equipment directly applicable to the Contract."

Plaintiff's position is that the language "used or reasonably required for use" extends coverage under the bond to any materialman who supplies goods to a subcontractor when those goods are reasonably required and intended for use in the performance of the contract. The position is that recovery may be had even though the goods are never delivered to the job site nor applied to or used in the performance of the contract.

The essential language of the statute requires that the bond be conditioned "for the payment for material and equipment rental which is actually used or rented in . . . performing the contract." It is also clear that the purpose of § 52-118 is to provide protection to materialmen and laborers in the construction or repair of public buildings where the provisions of the general mechanic's lien laws do not apply. Where the general mechanic's lien laws are applicable this court has consistently held that: "The lien of a materialman for materials furnished for the erection of a building, by virtue of an agreement with the contractor, extends to such materials only as are used in or delivered at the building for use therein." *The Wickes Corporation v. Frye*, 202 Neb. 23, 273 N.W.2d 663 (1979). The clear legislative policy is to provide the statutory bond coverage for the protection of laborers and materialmen who would otherwise be protected by general mechanic's and materialmen's lien laws.

The plaintiff contends that the language of the bond in the present case provides for a broader coverage than the statute itself because it covers materials "used or reasonably required for use" and argues that a contract of a surety for compensation should be construed most strongly against the surety and in a light most favorable to those entitled to protection under the contract.

Several courts have interpreted the language of

"used or reasonably required for use," although technically disjunctive rather than conjunctive, to mean materials actually used by the contractor in furtherance of the contract, and have treated the lanugage "reasonably required for use" as being inserted in the bond to protect the surety against extravagant and unnecessary use of labor and materials. See, *Gallimore, Inc. v. Home Indem. Co.*, 432 F. Supp. 434 (W.D. Va. 1977); *Middle-West Concrete v. General Ins. Co.*, 267 S.E.2d 742 (W. Va. 1980); *Standard Accident Ins. Co. of Detroit v. Rose*, 314 Ky. 233, 234 S.W.2d 728 (1950); 10 Appleman, Insurance Law and Practice, § 5941, p. 150.

It is apparent that the materials in the present case were not actually used in performing the contract nor were they delivered at the building site. The judgment of the District Court was correct and is affirmed.

AFFIRMED.

WILLIAM WITZEL, SR., AND MARIE WITZEL, HUSBAND AND WIFE, APPELLANTS, V. THE VILLAGE OF BRAINARD, A MUNICIPAL CORPORATION, APPELLEE.

302 N.W.2d 723

Filed March 6, 1981. No. 43268.

1. **Zoning: Eminent Domain.** Zoning ordinances are inapplicable to governmental projects for the construction of which the agency in question has the power to condemn or appropriate lands by the power of eminent domain.
2. ____: ____. The general rule is that the propriety of a taking of property by eminent domain is not defeated by the fact that the purpose for which the property is taken is a use prohibited by the zoning regulations.

Appeal from the District Court for Butler County: BRYCE BARTU, Judge. Affirmed.

George H. Moyer, Jr., of Moyer, Moyer & Egley for appellants.

Kent F. Jacobs of Blevens, Blevens & Jacobs for appellee.

Heard before BOSLAUGH, CLINTON, and BRODKEY, JJ., and REIMER and HIPPE, District Judges.

REIMER, District Judge.

The plaintiffs are owners of Lots 8, 9, and 10, Block 2, Original Town of the Village of Brainard in Butler County, Nebraska, upon which is located a dwelling house which they intend to remodel and occupy as a dwelling. The defendant Village acquired by purchase Lots 11 and 12, Block 2, Original Town of the Village of Brainard, Nebraska, and have duly proceeded to construct a fire station thereon.

The plaintiffs brought this action for injunction in the District Court of Butler County, Nebraska, alleging violations of the duly adopted zoning ordinances of the Village of Brainard, Nebraska. A temporary restraining order was issued by the county court of Butler County, Nebraska, on May 17, 1979, in the absence of a district judge within the county. The District Court of Butler County dissolved the restraining order and plaintiff's application for a temporary injunction was denied on July 9, 1979. On January 14, 1980, the District Court denied a permanent injunction and dismissed the plaintiffs' petition. Motion for new trial was denied and appeal to this court was perfected.

It appears from the evidence that the fire station, which at the time of hearing on the permanent injunction was nearing completion, did not comply with certain setback provisions of the zoning ordinance. Plaintiffs further complain that construction of a fire station within a business district zone is not a permitted use under the zoning ordinance.

The plaintiffs contend on this appeal that the District Court erred in failing to apply the terms of the zoning ordinance to the construction of the fire station. The decision of the District Court is affirmed.

This court has not previously dealt with this exact question, but did rule on a related question in *Seward County Board of Commissioners v. City of Seward*, 196 Neb. 266, 242 N.W.2d 849 (1976), by deciding that injunction against the city of Seward in its condemnation proceeding to acquire land for airport purposes was not warranted, even though the land was within the zoning jurisdiction of the Seward County board of commissioners and its use as an airport may not have been a permitted use under the existing zoning regulations applying to that specific land.

Other jurisdictions generally grant to municipalities exemption from zoning ordinances in varying degrees, depending upon the theory of exemption adopted in that jurisdiction. The discussion at 82 Am. Jur. 2d *Zoning and Planning* §§ 149, 150, 151, 152, and 153 (1976) indicates such exemptions may be based upon express exemption contained in the zoning ordinance, or pursuant to the construction of the zoning regulations themselves; also by the express language in a supervening statute suspending the applicability of the zoning regulation, and by reason of immunity of the sovereign from suit, or where the use of the property in question was in furtherance of a governmental, rather than a proprietary, function. In § 152 at 636-37, eminent domain is discussed: "The view has gained some ascendancy that zoning ordinances are inapplicable to governmental projects for the construction of which the agency in question has the power to condemn or appropriate lands by the power of eminent domain. The courts supporting this view have, at least tacitly, reasoned that the power of eminent domain is superior to the zoning power, and that a political subdivision with mere zoning authority should not be permitted to prevent or place limitations upon a public use of property in the furtherance of which a governmental entity has been clothed with condemnation power by the state legislature."

This court has adopted the eminent domain theory

of exemption in *Seward County Board of Commissioners v. City of Seward, supra* at 270, 242 N.W.2d at 852: "The general rule is that the propriety of a taking of property by eminent domain is not defeated by the fact that the purpose for which the property is taken is a use prohibited by the zoning regulations."

Furthermore, the Legislature has, at Neb. Rev. Stat. § 19-901 (Reissue 1977), limited the purposes of zoning by villages by the following language: "[L]egislative bodies . . . may adopt zoning regulations which regulate and restrict . . . the location and use of buildings, structures and land for trade, industry, residence or other purposes," and by inference withheld zoning authority over public buildings. In addition, the Legislature has provided for conflict between overlapping zoning authority in the grant of eminent domain authority at Neb. Rev. Stat. § 19-709 (Reissue 1977), wherein it is provided: "[T]he chairman and members of the board of trustees of any village shall have power to purchase or appropriate private property or school lands for the use of the . . . village for . . . public fire stations, training facilities for firemen . . . except that no . . . village may acquire through the exercise of the power of eminent domain or otherwise any real estate within the zoning jurisdiction of any other city of the first or second class or village for any of the works enumerated in this section if the use for which the real estate is to be acquired would be contrary to or would not be a use permitted by the existing zoning ordinances and regulations of such other city or village, but such real estate may be acquired within the zoning jurisdiction of another city of the first or second class or village for such contrary or nonpermitted use if the governing body of such other city or village shall approve such acquisition and use."

The order of the District Court denying permanent injunction and dismissing plaintiffs' petition is affirmed.

AFFIRMED.

CLINTON, J., concurs in result.

HIPPE, District Judge, dissenting.

The court is holding that a municipality is not subject to its own zoning regulations, and I dissent. If the court were committed to a line of precedent which would compel this result, that would be one thing. In Nebraska, however, the question is one of first impression.

Although the answer is open in Nebraska, the problem is not new. When governments were not significant land users, and the concept of zoning was new, exemptions from zoning regulations were uniformly granted to governments. See the discussion and cases cited in 2 Anderson, American Law of Zoning, § 12.03 (1976); 2 Metzenbaum, Law of Zoning, Ch. X-i (1955); 101 C.J.S. *Zoning* § 135 (1958); 82 Am. Jur. 2d *Zoning and Planning* §§ 149 et seq. (1976); Annot., 61 A.L.R.2d 970 (1958). The notion of governmental regulation over land use was not popular. The needs of the public were thwarted by zoning complications. One government may have need for land use in an area that another government had zoned and unreasonably refused variances. Sovereign immunity was the rule, eminent domain was perceived a superior principle, and governmental accountability was nonexistent. All of these reasons contributed to the general rule that zoning regulations do not apply to governmental operations.

The absurdity of the rule is very easy to demonstrate under modern conditions. For example, one city may condemn land in the limits of another city and place its sewage facilities there. That happened in *City of Scottsdale v. Municipal Court of Tempe*, 90 Ariz. 393, 368 P.2d 637 (1962), where the dissenting opinion argues for the rule proposed by this dissent. A municipality could put its sewage disposal facility in an area zoned by it for "residential A" uses. *Kedroff v. Town of Springfield*, 127 Vt. 624, 256 A.2d 457 (1969), is an example of

such a result. Or, it could do the same thing with the city dump. *Rose v. Commissioner of Public Health*, 361 Mass. 625, 282 N.E.2d 81 (1972), illustrates such a situation.

Recognizing these kinds of problems have compelled courts of first impression to adopt a more flexible rule. Recent cases so holding include *Porter v. Southwestern Public Service Company*, 489 S.W.2d 361 (Tex. Civ. App. 1972); *Orange County v. City of Apopka*, 299 So. 2d 652 (Fla. App. 1974); *Oronoco v. Rochester*, 293 Minn. 468, 197 N.W.2d 426 (1972); *St. Louis County v. City of Manchester*, 360 S.W.2d 638 (Mo. 1962); and *City of Fargo, Cass Cty. v. Harwood Tp.*, 256 N.W.2d 694 (N.D. 1977). This seems to be the trend and acknowledges the present-day state of affairs. Governments are now significant land users. If their operations are exempt from zoning, public anticipation for development will be dashed by the very government that encoded the rules. Urban sprawl and the concrete explosion intensifies the need for strict adherence to planning. Exempting governments makes a significant uncertainty as to how much one can count on land to be developed according to the applicable zoning plan.

These courts have articulated a "balancing-of-public-interests" test to handle problems when one public interest, such as providing a fire station, conflicts with another public interest, such as the certainty that land use planning be enforced. Each case is then analyzed to determine where the public interest lies. This makes sense, because all of the public power of municipalities has its source from state statute. The power to condemn; to establish governmental facilities such as fire stations, sewage facilities, city dumps, courthouses, etc.; and to zone are all equally important and have the same sovereign. To simply say that the power to zone must always bend if other powers come in conflict is simply *avoiding* the question, not *resolving* it. The problems in such conflict are certainly

complex and demand much more than the simplistic approach that a government with power of eminent domain may disregard anyone's zoning rules, their own included.

None of the typical problems illustrated in these types of cases are present here. The power of eminent domain was not used. Two competing governments are not involved. The Village did not exempt itself from its ordinance. The Village is clearly using its governmental, as opposed to proprietary, functions. Municipalities in Nebraska are no longer totally immune from suit. The Village of Brainard simply wants to locate its fire station next to the plaintiffs' home. Its zoning regulations prohibit it at that location. Therefore, the question is squarely presented, whether a municipality may disregard its own zoning requirements with no reason at all.

The statutory authority for village zoning mandates a comprehensive plan, including: "A land-use element which designates the proposed general distributions, general location, and extent of the uses of land for agriculture, housing, commerce, industry, recreation, education, *public buildings and lands, and other categories of public and private use of land.*" (Emphasis supplied.) Neb. Rev. Stat. § 19-903(1) (Reissue 1977).

The zoning for the land in question permits no public uses whatever. The Village has provision in the zoning regulation for securing a special permit for a governmental nonconforming use after a public hearing, but the city did not even get a regular building permit, much less apply for a special permit.

Nowhere in the Nebraska statutes is there an intimation that municipalities are exempt from their own zoning rules, nor does the ordinance of the Village of Brainard provide for that. It seems to me that the statutes assume that use by the public is one category to be designated in zoning. That being the case, it seems that zoning descriptions on uses of land must include whether it will have a public use. This one does not.

It might be argued that the zoning rules should not apply to a body that enacted them because they could change them anyway. Also, usually there is a way they could provide for exceptions. Therefore, it would be a waste of time to say the regulations apply in the first place.

The problem with this thought is that it overlooks the procedure a municipality must apply in changing its regulations. First, the public is aware of what happens because of a public hearing. Second, the pressure of politics is a factor in seeing that the right result is reached. Third, judicial review is available to guard against arbitrariness.

If the majority opinion is the law, then a municipality is not required to take those steps when it deviates from its zoning requirements. All it has to do is begin construction. Under such a scheme of justice, one could wake up to find a city dump construction starting next door in a residential area of the city. There would be no notice that the government was deviating from its own rules. There would be no public forum to air the grievance. There would not be political pressure one could bring. Worst of all, the courts would be closed to a collateral injunction under this ruling because the city is not legally required to comply with its regulations anyway. This is a colossal betrayal of legitimate public expectations. If governments cannot be trusted to follow established written rules, then who can?

The majority attempts to justify the result for two reasons. They first claim that *Seward County Board of Commissioners v. City of Seward*, 196 Neb. 266, 242 N.W.2d 849 (1976), adopts the rule that all governments possessing the power of eminent domain are exempt from zoning requirements. I would adopt the "balancing-of-public-interests" rule and hold the *Seward* case to its facts of city airport establishment power versus county zoning power.

They also intimate that Neb. Rev. Stat. § 19-901 (Reissue 1977) limits zoning power of municipalities to private uses by failing to mention public uses. Two sections later, however, the statutes insist that a comprehensive plan delineate and map the public uses of land, as well as private uses. The *Seward* case assumed that the county had power to zone regarding public uses, and I would suggest that the statutes assume likewise. This is so because the eminent domain statute, Neb. Rev. Stat. § 19-709 (Reissue 1977), provides for conflicts between certain eminent domain powers of cities of the first or second class or villages and the contrary zoning of other cities of the first or second class or villages. Thus, the Nebraska statutory scheme assumes that one city may zone according to public uses that another government may have within its limits.

Since the reasons for the result are illusory, it should be clear that more consideration must be given to formulating Nebraska law on the subject. A blanket rule proposed by the majority will come back to haunt this court, as it has others. It will permit governments possessing eminent domain powers to complicate sound planning by others. Worse yet, it permits a government to disregard its own written rules that everyone else is expected to follow. The approach urged in this dissent still permits legitimate public endeavors where their need is clearly demonstrated. It does not hamstring municipalities from providing needed services; it just makes them do so within the framework of their own regulations. It does, however, provide a forum for the aggrieved neighbor. The majority rule does not.

STATE OF NEBRASKA, APPELLEE, V. JAMES RAY MOORE, APPELLANT.

302 N.W.2d 728

Filed March 6, 1981. Nos. 43451, 43452.

1. **Sexual Assault: Sexual Sociopath: Delayed Sentences.** Upon a delayed sentencing for a sexual offense, credit must be given for time spent in confinement under a commitment as a sexual sociopath based on the same sexual offense.
2. ____: ____: ____. Where delayed consecutive sentences for sexual offenses are pronounced, credit for time served under a prior sexual sociopath commitment based on the same sexual offenses is to be applied to the first sexual sentence to be served. Only excess credit, if any, is to be applied to any consecutive sexual sentence to be served later. Credit shall not be applied on any sentence until the defendant commences to serve the sentence.

Appeal from the District Court for Douglas County: JOHN E. CLARK, Judge. Affirmed as modified.

Thomas M. Kenney, Douglas County Public Defender, and Bennett G. Hornstein for appellant.

Paul L. Douglas, Attorney General, and Shanler D. Cronk for appellee.

Heard before KRIVOSHA, C.J., BOSLAUGH, MCCOWN, CLINTON, BRODKEY, WHITE, and HASTINGS, JJ.

MCCOWN, J.

The defendant has appealed from delayed sentences imposed upon him for sexual offenses. The defendant contends that he was erroneously denied credit on the sentences for the time he was confined as an untreatable sexual sociopath and that the sentences were excessive.

The defendant was originally charged in two separate criminal prosecutions. Case No. 43451 arose out of events which occurred on June 27, 1975. In that proceeding the defendant was charged with robbery, forcible rape, sodomy, and use of a firearm in the commission of a felony. He was found guilty by a jury on all four counts. On December 5, 1975, he was sentenced to 15 to 30 years' imprisonment on the robbery count

and to not less than 3 years nor more than 10 years on the unlawful use of a firearm count, with that sentence to run consecutively to the robbery sentence. Sentencing was delayed on the rape and sodomy counts to determine whether the defendant was a sexual sociopath. On March 19, 1976, the defendant was found to be an untreatable sexual sociopath and committed to the Nebraska Penal and Correctional Complex for an indefinite period and ordered to be kept separate from the regular prison population.

The second case, No. 43452, arose out of events which occurred on May 6, 1975, involving a different victim. In that proceeding the defendant was charged with robbery, forcible rape, use of a firearm in the commission of a felony, and by later amendment an habitual criminal count was added. On January 22, 1976, the defendant pleaded guilty to the robbery and the rape charges, and the firearm and habitual criminal charges were dismissed. On the same day the defendant was sentenced to not less than 15 years nor more than 30 years' imprisonment on the robbery count, the sentence to run concurrently with the sentences already imposed in case No. 43451. The sentence on the rape charge was deferred for determination of the defendant's status as a sexual sociopath. On March 19, 1976, the defendant was found to be an untreatable sexual sociopath as to the rape count and ordered confined in the Nebraska Penal and Correctional Complex under provisions essentially the same as in the first prosecution.

On March 27, 1979, in an unrelated case interpreting the sexual sociopath statutes under which the defendant was committed, this court held that upon completion of any proceedings to determine that a defendant was a sexual sociopath, at the earliest possible time thereafter a defendant was to be returned to the District Court and an appropriate sentence on the criminal charge was to be imposed. We said: "Such sentence shall be deemed to commence from such time as defend-

ant is committed to either the Nebraska Regional Center or the Nebraska Penal and Correctional Complex, less any credit for time already spent in incarceration." *State v. Shaw*, 202 Neb. 766, 771, 277 N.W.2d 106, 110-11 (1979).

With respect to persons then in custody as sexual sociopaths who had not previously been sentenced, this court directed that they should be returned to the district in which they were convicted for the purpose of sentencing on the criminal charge, and we said: "Such sentence shall commence to run from the date in [sic] which such defendant was incarcerated less appropriate credit for time served prior to conviction." *Shaw* at 772, 277 N.W.2d at 111.

In 1979 the sexual sociopath laws under which the defendant had been committed to the penal complex as a sexual sociopath were repealed and replaced by Neb. Rev. Stat. §§ 29-2911 to 29-2921 (Reissue 1979). The new statutes became effective May 24, 1979. The statutes require that persons convicted of a felony sexual offense and believed to be "mentally disordered sex offenders," after evaluation, are to be sentenced for the felony sexual offense. If the defendant is found not to be a mentally disordered sex offender or a nontreatable mentally disordered sex offender the defendant is to be sentenced "as provided by law on the offense for which he or she has been convicted." If the defendant is found to be a mentally disordered sex offender whose disorder is treatable, the court is to commit the defendant for treatment in a regional center. If, after commitment for treatment, it is determined that a defendant no longer has a mental disorder or that he has received the maximum benefit of treatment, the defendant is required to be returned to the sentencing court for further disposition, which can include sending the defendant to the Nebraska Penal and Correctional Complex for the remainder of his or her sentence or further disposition not inconsistent with the terms of the statutes. Credit is required to be given on the

sentence for the time spent in treatment. See §§ 29-2912 to 29-2919.

Section 29-2921 provides that all persons committed as sexual psychopaths or sexual sociopaths under prior statutes, now repealed, should forthwith be returned to the District Court which committed them for review and disposition consistent with the terms of the new statutes.

In April 1980 the defendant was returned to the District Court for sentencing in both cases on the sexual offenses underlying his 1976 commitment as a sexual sociopath. On April 24, 1980, the District Court, in case No. 43451, found that the defendant was not a mentally disordered sex offender and sentenced him to imprisonment for not less than 5 years nor more than 10 years on the rape conviction, the sentence to be consecutive to the previous consecutive sentences for robbery and for use of a firearm in commission of a felony. The District Court also sentenced the defendant to imprisonment for not less than 5 years nor more than 10 years on the sodomy charge and provided that that sentence was to be consecutive to the rape sentence pronounced on the same day. The District Court granted no credit for time served as a sexual sociopath against either the rape or the sodomy sentence.

On the same day, in case No. 43452, the District Court sentenced the defendant to imprisonment for not less than 5 years nor more than 10 years for rape and provided that the sentence should be consecutive to the robbery sentence pronounced in 1976 in the same case, and directed that both sentences were to run concurrently with the sentences pronounced in case No. 43451.

In this appeal the defendant contends that he was erroneously denied any credit for the 4 years and 26 days he was confined in the penal complex under commitment as a sexual sociopath without having been sentenced on the underlying sexual crimes. He also contends that the sentences were excessive.

The statutes pertaining to mentally disordered sex offenders under which the defendant was sentenced, as well as our prior decision in *State v. Shaw*, make it clear that upon a delayed sentencing for a sexual offense credit must be given for time spent in confinement under a commitment as a sexual sociopath based on the same sexual offense. No problem arises except in cases where consecutive sentences are imposed. Sections 29-2911 to 29-2921 do not restrict the imposition of consecutive sentences nor place any limitations on the designation of the order in which multiple consecutive sentences shall be served.

Where delayed consecutive sentences for sexual offenses are pronounced, as in this case, credit for time served under a prior sexual sociopath commitment based on the same sexual offenses is to be applied to the first sexual sentence to be served. Only excess credit, if any, is to be applied to any consecutive sexual sentence to be served later. Credit shall not be applied on any sentence until the defendant commences to serve the sentence.

The defendant also asserts that the sentences in this case were excessive. The sentences were well within statutory limits and the record establishes that there was no abuse of discretion on the part of the trial court.

That portion of the judgment in case No. 43451 denying credit against the sexual sentences for time spent under commitment as a sexual sociopath is vacated. Credit of 4 years 26 days shall be given on the rape sentence in case No. 43451 to be credited at the time the defendant commences to serve that sentence. As so modified the judgments and sentences are affirmed.

AFFIRMED AS MODIFIED.

KRIVOSHA, C.J., concurs in result.

HASTINGS, J., dissenting.

The effect of the majority opinion is to reduce by 4 years and 26 days the clear and explicit sentences of

the District Court. This was accomplished by a somewhat strained application of the rule laid down in *State v. Shaw*, 202 Neb. 766, 277 N.W.2d 106 (1979), under similar but significantly distinguishable circumstances.

In *Shaw*, at the time he was returned to the trial court for sentencing pursuant to our order, he was being held in the penitentiary solely because of his commitment as a sexual sociopath. He had no liability to the State of Nebraska for penal servitude other than that for the crime of sexual assault. Therefore, it was entirely proper that he be given credit against his obligation under a sentence for that crime for the time which he had already served.

Here, however, at the time of the court's entry of the order of commitment as a sexual sociopath, the defendant had been sentenced to the penitentiary for crimes other than the sexual crimes and had begun to serve those sentences. Until he had completed those sentences, he was not free to begin any period of confinement for different crimes.

Nevertheless, as a result of our opinion today, it appears that defendant will receive credit against both his sentences for robbery and sexual assault for the same period of time served, contrary to the stated intention of the District Court. I disagree with that result.

BOSLAUGH and CLINTON, JJ., join in this dissent.

STATE OF NEBRASKA, APPELLEE, V. ROBERT COUSINS, APPELLANT.

302 N.W.2d 731

Filed March 6, 1981. No. 43483.

1. **Sentences.** A sentence validly imposed takes effect from the time it is pronounced and a subsequent sentence, fixing a different term, is a nullity.

2. ____. The general rule applies to valid sentences even where the sentencing judge indicates that the change is intended only to correct an ambiguity or a prior misstatement.

Appeal from the District Court for Lincoln County: KEITH WINDRUM, Judge. Reversed.

Scott P. Helvie, Sean J. Brennan, and Shelley K. Stall, Public Defenders of Lincoln County, for appellant.

Paul L. Douglas, Attorney General, and Patrick T. O'Brien for appellee.

Heard before KRIVOSHA, C.J., BOSLAUGH, MCCOWN, CLINTON, BRODKEY, WHITE, and HASTINGS, JJ.

WHITE, J.

This case involves the single question of whether a District Court is permitted to amend a valid sentence. The defendant was charged with and found guilty of violating Neb. Rev. Stat. § 28-912(1) and (5) (Reissue 1979), escaping while under arrest for a felony.

In passing sentence, the trial judge said as follows: "This sentence then shall be to the Nebraska Penal and Correctional Complex for a period of one year to eighteen months to be served consecutive to the one I sentenced him on this morning [Lincoln County District Court Case No. 77-48] and *concurrently* to the one Judge Stuart sentenced, [Lincoln County District Court Case No. 79-12] with no credit for jail time." (Emphasis supplied.) Approximately 6 minutes later, the court ordered the parties to return to the courtroom. "THE COURT: Let the record show I called the parties back and announced I am not changing any sentence but I am correcting a statement from the Bench. I did not mean this would be concurrent to the sentence imposed by Judge Stuart [Lincoln County District Court Case No. 79-12]. I mean this would be consecutive. I did not want to give this defendant the same amount because of a different history, but it is a second offense. I should have said consecutive to the one imposed by Judge Stuart."

The trial court's attempt to correct the inadvertent use of the word "concurrent," when he meant "consecutive," is ineffective. "The rule is that a sentence validly imposed takes effect from the time it is pronounced and that a subsequent sentence fixing a different term is a nullity." *State v. Snider*, 197 Neb. 317, 319, 248 N.W.2d 342, 343 (1977); *State v. Brewer*, 190 Neb. 667, 212 N.W. 2d 90 (1973). The sentence was valid. The crime of escape while under arrest is a Class III felony, and the following penalties are authorized: maximum 20 years' imprisonment or $25,000 fine, or both; minimum, 1 year's imprisonment. The State argues here that since the pronouncement of the word "concurrent" was inadvertent, the court is permitted to amend this sentence under the authority of *State v. Brewer, supra*, and *State v. Snider, supra*. In *Snider*, the court stated that the attempted change of sentence in that case was not "the clarification of an ambiguity or correction of a prior misstatement" and was, therefore, a nullity. *Id.* at 319, 248 N.W.2d at 343.

However, to begin questioning whether a valid sentence has been pronounced inadvertently would involve this court in a morass. We would be called upon to read the mind of the sentencing judge in any circumstance in which a valid sentence had been pronounced and later amended due to the judge's proclaimed inadvertence. We think that would not be the better rule, nor would it be in keeping with the spirit of our previous cases. Therefore, to the extent that *State v. Snider, supra*, might indicate that the mere inadvertence in pronouncing a valid sentence would justify the court in pronouncing another sentence, it is overruled. The revised judgment of the District Court is reversed.

REVERSED.

STATE OF NEBRASKA, APPELLEE, V. KEVIN DEAN RANDALL, APPELLANT.

302 N.W.2d 733

Filed March 6, 1981. No. 43532.

Homicide: Sentences. Under present statutes, upon conviction for second degree murder, the court is not authorized to pronounce an indeterminate sentence. The court may impose a sentence of a definite term of years, not less than the minimum authorized by law; or, in the alternative, may impose a sentence of life imprisonment.

Appeal from the District Court for Saunders County: BRYCE BARTU, Judge. Reversed and remanded with directions.

Willis G. Yoesel for appellant.

Paul L. Douglas, Attorney General, and John Boehm for appellee.

Heard before KRIVOSHA, C.J., BOSLAUGH, MCCOWN, CLINTON, BRODKEY, WHITE, and HASTINGS, JJ.

KRIVOSHA, C.J.

The appellant, Kevin Dean Randall, was charged with the crime of murder in the first degree. Following plea-bargaining negotiations, the State of Nebraska filed an amended information charging Randall with murder in the second degree, to which he entered a plea of guilty. After receiving a presentence investigation and evaluation, the court sentenced Randall to a term of imprisonment in the Nebraska Penal and Correctional Complex for a period of not less than 30 years nor more than his natural life. It is from this sentence which appellant has appealed, maintaining that the trial court erred in imposing an indeterminate sentence of not less than 30 years nor more than life imprisonment, and for the further reason that the trial court abused its discretion by imposing a sentence allegedly in excess of the facts and circumstances of the case.

In view of our decision in the case of *State v. Laravie*, 192 Neb. 625, 223 N.W.2d 435 (1974), we need only consider Randall's first assignment of error. In *Laravie*, *supra* at 628, 223 N.W.2d at 437, we held that: "Under present statutes, upon conviction for second degree murder, the court is not authorized to pronounce an indeterminate sentence. The court may impose a sentence of a definite term of years, not less than the minimum authorized by law; or, in the alternative, may impose a sentence of life imprisonment." The record clearly reflects that the sentence in this case is in conflict with our holding in *Laravie*. Accordingly, we must therefore reverse the instant matter and remand the case back to the District Court with instructions to impose a sentence in accordance with the standards set out in *State v. Laravie*, *supra*.

Having thus disposed of the matter on this basis, we need not now consider Randall's second assignment of error.

REVERSED AND REMANDED WITH DIRECTIONS.

WHITE, J., concurs in result.

BOSLAUGH, J., dissenting.

In *State v. Laravie*, 192 Neb. 625, 223 N.W.2d 435 (1974), we held that a trial court was not authorized to impose an indeterminate sentence for second degree murder. Upon further consideration of the *Laravie* case, I now believe the decision was in error, and that the judgment in this case should be affirmed.

The decision in the *Laravie* case was based upon our decision in *State v. Suggett*, 189 Neb. 714, 204 N.W.2d 793 (1973), in which we *affirmed a sentence of 20 to 30 years' imprisonment for second degree murder.* The *Suggett* case held that the limitation in Neb. Rev. Stat. § 83-1,105 (Reissue 1976), that the minimum sentence imposed shall not be more than one-third of the maximum term authorized by law, was not applicable to an offense for which a sentence of life imprisonment was authorized because it was impossible to determine

what would be one-third of a sentence to life imprisonment. The opinion concluded that § 83-1,105 "was not legislatively designed to apply in cases of this type."

The decision in the Suggett case affirmed an indeterminate sentence of 20 to 30 years' imprisonment for second degree murder. The opinion in the *Laravie* case simply misconstrued the holding in the *Suggett* case.

The *Laravie* case did not abolish indeterminate sentences in second degree murder cases. To the contrary, it resulted in every sentence in a second degree murder case being effective as an indeterminate sentence with the statutory minimum of imprisonment for 10 years as the minimum term. See, *State v. Thompson*, 189 Neb. 115, 201 N.W.2d 204 (1972); *State v. Hedglin*, 192 Neb. 545, 222 N.W.2d 829 (1974). Upon remand and resentencing in this case, whatever sentence may be imposed, the effect will be an indeterminate sentence for 10 years to whatever term may be imposed, including life imprisonment.

The effect of the *Laravie* case was to prevent the trial court from imposing a sentence which would require the defendant to serve more than at least the statutory minimum of imprisonment for 10 years. The decision in the *Laravie* case was in error and should be overruled. The judgment in this case should be affirmed.

CLINTON and HASTINGS, JJ., join in this dissent.

STATE OF NEBRASKA, APPELLEE, V. RICHARD PENA, APPELLANT.

302 N.W.2d 735

Filed March 6, 1981. No. 43618.

1. **Jury Verdicts: Appeal and Error.** The verdict of the jury must be sustained if, taking the view most favorable to the State, there is sufficient evidence to support it.

2. **Criminal Law: Evidence.** In determining the sufficiency of the evidence to sustain a conviction in a criminal prosecution, it is not the province of this court to resolve conflicts in the evidence, pass upon the credibility of witnesses, determine the plausibility of explanations, or weigh the evidence, as such matters are for the jury.
3. **Expert Witnesses: Identification Procedures.** Fingerprint identity testified to by a qualified expert is perhaps the best known method of the highest probative value in establishing identification.
4. **Criminal Law: Evidence.** Evidence of a defendant's fingerprints has probative value; and it is for the jury to determine, in light of all other evidence, whether such evidence permits an inference to be drawn that beyond a reasonable doubt defendant was the person who committed the offense in question.

Appeal from the District Court for Douglas County: JAMES M. MURPHY, Judge. Affirmed.

Anthony S. Troia and James E. Riha for appellant.

Paul L. Douglas, Attorney General, and Marilyn B. Hutchinson for appellee.

Heard before KRIVOSHA, C.J., BOSLAUGH, MCCOWN, CLINTON, BRODKEY, WHITE, and HASTINGS, JJ.

BRODKEY, J.

Richard Pena, defendant below, appeals to this court from his conviction and sentence by the District Court of Douglas County, Nebraska, for the offenses of robbery, in violation of Neb. Rev. Stat. § 28-324 (Reissue 1979), and use of a firearm in the commission of a felony, in violation of Neb. Rev. Stat. § 28-1205 (Reissue 1979). We affirm.

The facts of this case, as revealed in the record, indicate that on January 24, 1980, two black men wearing masks entered the Vess Beverage Company located at 915 North 24th Street in Omaha. The men entered the beverage company through an unlocked door which opened onto the company plant area. They proceeded to the office of Donald Sharp, the corporate secretary of Vess Beverage Company, where they demanded cash from both Sharp and his secretary, Lois Braun. Sharp went to the company safe and removed a cashbox, which

was described as an 8- x 8-inch metal box. The cashbox contained approximately $40 at the time of the robbery. After Sharp placed the cashbox on his desk, one of the masked robbers, who was not wearing gloves, opened the box and took the money. Sharp was then ordered by the men to crawl underneath his secretary's desk, who in turn was directed to lie on the floor while the two men fled. Shortly thereafter, Sharp notified the Omaha Police Department, and the robbery area was dusted for fingerprints by a member of the police identification technician bureau. Two clear, latent prints were taken from the cashbox which had been opened by one of the robbers.

On February 2, 1980, the defendant was booked at the Omaha Central Police Station, during which process he was fingerprinted by the police. A subsequent analysis of the defendant's fingerprints found that they matched the two prints which had been taken from the cashbox at Vess Beverage Company. Pena was thereafter charged with robbery and for the commission of a felony with the use of a firearm. The defendant pled not guilty to both counts. On May 27 and 28, 1980, a jury trial was conducted before the District Court of Douglas County. The State introduced three witnesses, Cleve W. Albaugh, an identification technician with the Omaha Police Department, and Marcellus S. Deats, Jr., and Beverly Mazur, who were both qualified as experts in fingerprint identifications and comparisons. These witnesses each testified that, in their opinion, the fingerprints found on the cashbox matched those of the defendant's. Mr. Sharp and his secretary were called to establish that only they, or the president of Vess Beverage Company, had access to, or the authority to withdraw, items located in the safe.

At the close of the State's case, the defendant moved for dismissal, alleging lack of sufficient evidence to establish that he was the same person who had taken the money from the cashbox at Vess Beverage Company. The motion was overruled, and the defendant called a

witness to testify that the defendant had been at his home at the time of the crime. The defendant did not testify and the jury was instructed that it could draw no conclusions or inferences from his failure to take the stand. On May 28, 1980, the jury returned a verdict of guilty on both counts. On July 24, 1980, the defendant was sentenced by the trial court to a term of 8 to 12 years' imprisonment for the robbery conviction, and a consecutive term of 3 to 5 years' imprisonment for the use of a firearm in the commission of a felony conviction. Defendant was granted credit for the time he had spent in custody since January 28, 1980.

The defendant now appeals to this court, alleging that the trial court erred in overruling his motion to dismiss because, as a matter of law, there was not sufficient evidence to take the matter to the jury. It is the defendant's contention that the evidence presented as to the fingerprints, alone, is insufficient to establish his identity as the person who took the money from the cashbox at Vess Beverage Company.

This court has adopted the rule in criminal cases that the verdict of a jury must be sustained if, taking the view most favorable to the State, there is sufficient evidence to support it. *State v. Matthews*, 205 Neb. 709, 289 N.W.2d 542 (1980); *State v. Fowler*, 193 Neb. 420, 227 N.W.2d 589 (1975). See, also, *Glasser v. United States*, 315 U.S. 60, 62 S. Ct. 457, 86 L. Ed. 680 (1942). We have also held that in determining the sufficiency of the evidence to sustain a conviction in a criminal prosecution, it is not the province of this court to resolve conflicts in the evidence, pass upon the credibility of witnesses, determine the plausibility of explanations, or weigh the evidence, as such matters are for the jury. *State v. Mills*, 199 Neb. 295, 258 N.W.2d 628 (1977).

Defendant Pena was connected with the robbery at Vess Beverage Company by expert testimony matching his known fingerprints with the latent, or unidentified, fingerprints taken from the cashbox which the robber

handled with his bare hands. The fingerprint expert who testified stated that although he only required eight points of similarity between the latent fingerprint and the known fingerprint, in this case there were at least twelve points of similarity, and probably more, although he did not deem it necessary to continue with the identification as it would have been redundant.

The process of matching known fingerprints with latent fingerprints for the purpose of identifying a criminal suspect is a procedure which has been approved by this court. In *State v. Riley*, 182 Neb. 300, 303, 154 N.W.2d 741, 743 (1967), this court stated: "Fingerprint identity testified to by a qualified expert is perhaps the best known method of the highest probative value in establishing identification." See, also, *Sharp v. State*, 117 Neb. 304, 220 N.W. 292 (1928).

Defendant contends, however, that there was an insufficiency of evidence to show that the fingerprints in question were placed on the metal box at the time of the robbery, and argues that they might well have been innocently placed there at some prior time. The evidence in the record establishes, however, that the area in which the cashbox was kept was generally inaccessible to the public, although it was accessible to the corporate secretary of Vess Beverage Company, his secretary, and the president of the company. A similar situation was presented to the United States Court of Appeals, Eighth Circuit, in *United States v. Scarpellino*, 431 F.2d 475 (8th Cir. 1970), where the court held that the fact that many people may have had access to a stolen car while it was on a used car lot and that the government did not prove the car was generally inaccessible to defendant unless he had possession of it did not render inadmissible the fingerprints taken from the car. In his opinion, Judge Gibson stated as follows: "Fingerprint evidence is of course admissible for the purpose of identifying the accused and of connecting him to the offense. The above sequence of events establishes that the stolen Riviera was used by the robbers in

the Midwest Federal robbery. The fact that many people may have had access to the stolen car while it was on the used car lot and that the Government did not prove the car was generally inaccessible to defendant unless he had possession of it did not render inadmissible fingerprints taken from the car. The evidence had probative value and whether it supported the inference that defendant was in the car at the time it was used to flee the scene of the robbery was for the jury to determine." *Id.* at 478. Also, in *United States v. Roustio*, 455 F.2d 366 (7th Cir. 1972), that court in its opinion, citing *Holland v. United States*, 348 U.S. 121, 75 S. Ct. 127, 99 L. Ed. 150 (1954), stated: "We hold here that defendant's fingerprints had probative value and that it was for the jury to determine, in light of all the other evidence, drawing upon their own common sense and general experience, whether such evidence permitted an inference to be drawn that beyond a reasonable doubt defendant robbed the bank in question. The jury was convinced beyond a reasonable doubt and 'we can require no more.'" *Id.* at 370. In this connection, see, also, *United States v. Nazarok*, 330 F. Supp. 1054 (E.D. Pa. 1971).

The jury at the trial heard the expert testimony identifying the latent fingerprints from the cashbox as those of the defendant's. It also heard testimony which established that the cashbox was normally kept away from public access and that the defendant had no authorized access to the box. Finally, the jury heard the testimony of the witness called on behalf of the defendant who gave alibi testimony as to the whereabouts of the defendant at the time of the alleged robbery. The jury, having heard all the evidence, found the defendant to be guilty of the crime charged. We determine that the evidence presented at the trial was sufficient to sustain the conviction; and the judgment of the trial court must be, and is, affirmed.

AFFIRMED.

IN RE INTEREST OF GOODON. STATE OF NEBRASKA, APPELLANT, V. BEN GOODON ET AL., APPELLEES.

303 N.W.2d 278

Filed March 13, 1981. No. 43048.

1. **Parental Rights.** The juvenile court may terminate all parental rights of parents when the court finds such action to be in the best interests of the child or children and it appears by the evidence that one or more of the conditions set out in Neb. Rev. Stat. § 43-209 (Reissue 1978) exist.
2. ——. An order of the juvenile court terminating parental rights under Neb. Rev. Stat. § 43-209 (Reissue 1978) must be supported by clear and convincing evidence.
3. **Appeal and Error: Juvenile Courts.** An appeal of a juvenile case is heard by trial de novo upon the record. The findings of fact by the trial court will be accorded great weight because the trial court heard and observed the parties and witnesses, and those findings will not be set aside on appeal unless they are against the weight of the evidence or there is a clear abuse of discretion.

Appeal from the District Court for Harlan County: BERNARD SPRAGUE, Judge. Reversed and remanded.

Thomas P. McNally for appellant.

Stephen A. Scherr for appellee Doris Goodon.

Lloyd W. Kelly of Kelly, Kelly & Kelly for appellee Ben Goodon.

Heard before KRIVOSHA, C.J., MCCOWN, and HASTINGS, JJ., and COLWELL and CANIGLIA, District Judges.

MCCOWN, J.

This is a proceeding to terminate parental rights. The county court of Harlan County, Nebraska, terminated the parental rights of Ben Goodon and Doris Goodon with respect to their five children. On appeal, the District Court vacated the order of the county court terminating parental rights. The State has appealed.

In December 1977 and January 1978 the county

attorney of Harlan County filed petitions alleging that Brenda Goodon, age 14, Colleen Goodon, age 8, Janice Goodon, age 7, Rickie Goodon, age 11, and David Goodon, age 12, children of Ben and Doris Goodon, were neglected or abandoned children within the meaning of Neb. Rev. Stat. § 43-202(2)(a), (b), and (c) (Reissue 1978). The evidence at the adjudicatory hearing established that the parents had substantially and repeatedly neglected the children and failed to provide proper care necessary for the health, morals, and well-being of the children. The evidence also established that Ben Goodon was an alcoholic, had engaged in sexual activities with his daughters, and had physically abused the children. Doris Goodon, who was represented by counsel, stipulated and agreed that the children were abandoned or neglected children under § 43-202(2)(a), (b), and (c). Although Ben Goodon had actual notice of the hearing, he did not appear.

On March 2, 1978, the county court found the children to be children designated under § 43-202(2)(a), (b), and (c) and placed legal custody of the children in the court and granted physical custody to Doris Goodon pursuant to her stipulation and agreement that she would immediately proceed to seek a divorce from Ben Goodon. The court ordered Ben Goodon not to come upon the premises upon which the children were residing at any time and ordered Doris Goodon to notify law enforcement authorities at once if he came upon the premises or attempted to do so.

On May 8, 1978, Ben Goodon was found on the premises where the children were living with Doris Goodon. The children were removed from the home and placed in temporary custody of the welfare department. On May 18, 1978, following a hearing, the court found that the order of March 2, 1978, had been violated in that Ben Goodon was residing with the children and that the violation presented sufficient potential harm to the children to justify taking temporary physical custody of the children pending a final

hearing, and that the best interests of the children would be served by retaining them in the custody of the State. Legal and physical custody of the children has remained with the State since that date.

On July 19, 1978, the county attorney filed a motion to terminate the parental rights of Ben Goodon and Doris Goodon. Hearing was held on the motion to terminate parental rights on October 26 and 27, 1978, at which all parties were represented by counsel.

On February 20, 1979, the county court entered its order and decree specifically finding that Ben Goodon had sexually molested certain of his female children; that he suffers from a severe alcohol addiction; that Doris Goodon had shown an inability to protect her children from Ben Goodon's drinking habits and physical abuse of the children; and that her failure to protect her children from him has irreparably affected the children's health, morals, and well-being. The court also found that there was a history of abuse of the children and an unwillingness to recognize or discharge parental responsibilities for any substantial period of time and that juvenile proceedings involving neglect of children had been filed previously in three other states. The court also found that in various degrees the children are suffering from emotional and psychological illnesses as the result of Ben Goodon's behavior toward them and the home environment in which they have been living. The county court therefore terminated the parental rights of Ben Goodon as to all five children and terminated the parental rights of Doris Goodon as to all the children except Brenda. Custody of the four younger children was placed in the Department of Public Welfare of the State of Nebraska for placement in approved family homes or for adoption. Custody of Brenda was placed in the Department of Public Welfare for placement in an approved family home and Doris Goodon was granted reasonable rights of visitation as to Brenda. It was specifically ordered that Ben Goodon was to

have no visitation rights. Ben and Doris Goodon appealed to the District Court.

The District Court stayed the order of the county court authorizing adoption and granted the parents limited visitation rights pending the appeal.

On July 9, 1979, following the reception into evidence of the record from the county court and arguments of counsel, the District Court took the matter under advisement. On July 24, 1979, the District Court entered its order vacating the ruling of the county court terminating parental rights. The State has appealed.

The juvenile court in each county may terminate parental rights between the parents of a child and such child when the court finds such action to be in the best interests of the child and it appears by the evidence that one or more of the following conditions exist: "(2) The parents have substantially and continuously or repeatedly neglected the child and refused to give the child necessary parental care and protection;

. . . .

"(4) The parents are unfit by reason of debauchery, habitual use of intoxicating liquor or narcotic drugs or repeated lewd and lascivious behavior, which conduct is found by the court to be seriously detrimental to the health, morals, or well-being of the child . . . ." See Neb. Rev. Stat. § 43-209 (Reissue 1978).

An order of the juvenile court terminating parental rights under § 43-209 must be supported by clear and convincing evidence. *State v. Wedige*, 205 Neb. 687, 289 N.W.2d 538 (1980); *In re Interest of Morford*, 207 Neb. 627, 300 N.W.2d 795 (1980).

In the present case, the parents contend that the evidence of parental misconduct, particularly sexual misconduct on the part of Ben Goodon, was not clear and convincing. The argument is that the testimony of several State's witnesses as to sexual miscon-

duct was based merely on statements of the children or of the mother made to the witnesses on various occasions, while the children who testified on the witness stand, in the presence of their parents, denied any sexual misconduct. It should be noted that the juvenile judge at the hearing on termination of parental rights had previously conducted the adjudicatory hearing under § 43-202, and specifically took judicial notice of that evidence in this termination proceeding.

An appeal of a juvenile case is heard by trial de novo upon the record. The findings of fact by the trial court will be accorded great weight because the trial court heard and observed the parties and witnesses, and those findings will not be set aside on appeal unless they are against the weight of the evidence or there is a clear abuse of discretion. *State v. Jenkins*, 198 Neb. 311, 252 N.W.2d 280 (1977); *In re Interest of Morford, supra.*

In the case now before us, the District Court made no findings of fact, and the findings of fact of the juvenile court at trial with respect to Ben Goodon are clear and convincingly supported by the evidence. The findings of fact with respect to Doris Goodon are related to her inability to protect her children from her husband and the conclusion that her lack of resolve, courage, or ability to protect her children also irreparably affected the children's health, morals, and well-being. The evidence in this case sustains the action of the juvenile court in terminating parental rights. The decree of the county court was correct and should have been affirmed.

The order of the District Court vacating the decree of the county court is reversed and the decree of the county court of February 20, 1979, is reinstated and affirmed.

REVERSED AND REMANDED.

KRIVOSHA, C.J., dissenting.

I find that I must regrettably dissent from the

majority in this case. I have no quarrel with the majority's view that the best interests of the children demand that their legal and physical custody be placed with the State and not with their parents. My quarrel with the majority is in its affirming the county court in terminating the parental rights of the mother in this case. We are not here dealing with children of tender years but, rather, children today who range in age from 10 to 15. Though their needs are no less than children of tender age, experience has taught us that the likelihood of their being adopted either together as a family or individually at this age is virtually impossible. In effect, then, we are not only terminating the relationship between the parents and their children, but may likewise be terminating the relationship of brother and sister as between each child.

I believe the reality of the matter, as was apparently concluded by the District Court, is that these children are unadoptable. And so we have, by our action herein, made these youngsters "children without parents." I know of no court order which will cause a 15-year-old child to forget his biological parents, nor to forget brothers and sisters of near equal age. It was apparently for that reason that even the county court concluded that the parental rights of the oldest child, Brenda, should not be terminated and, instead, she simply be placed in the custody of the State.

Neb. Rev. Stat. § 43-209 (Reissue 1978) specifically provides, in part, as follows: "The court may terminate all parental rights between the parents . . . when the court finds such action to be in the best interests of the child . . . ." I have difficulty concluding how terminating the parental rights and leaving these children without any parent, or the real prospect of any parent, can be in their own best interests. Courts must address these matters realistically. It is one thing to remove the physical custody of an abused child and place it with the State; it is another thing to attempt to terminate parental rights of children who have reached the

ages of the children involved in this case, particularly where there is no evidence of any interest by anyone to adopt them. The jurisdiction of the juvenile court is a continuing jurisdiction once a child has been adjudged to be neglected. See *State v. Miller*, 189 Neb. 383, 203 N.W.2d 97 (1972). The options available to the juvenile court, short of terminating parental rights for the best interests of the child, are many. See Neb. Rev. Stat. § 43-210 (Reissue 1978). I believe that the action of the District Court was the more appropriate one in this case, in that we would then be granted the option of attempting to find a home or homes for these children before we publicly declared they are without parents. I believe we have, in effect, burned the children's bridges behind them without knowing that there is any road to the future. I would have affirmed the judgment of the District Court.

CANIGLIA, District Judge, joins in this dissent.

GERALD T. SULLIVAN, APPELLEE, V.
GEO. A. HORMEL AND COMPANY,
A DELAWARE CORPORATION, AND
LUEDER CONSTRUCTION COMPANY,
A DELAWARE CORPORATION, APPELLANTS.

303 N.W.2d 476

Filed March 13, 1981. No. 43158.

1. **Contractors and Subcontractors: Negligence.** With certain exceptions, the employer of an independent contractor is not liable for physical harm caused to another by the acts or omissions of the contractor or his servants.
2. **Contractors and Subcontractors: Words and Phrases.** The term "independent contractor" includes building contractors erecting a building for a fixed sum according to specifications and not subject to the owner's control over the method of accomplishment.
3. **Contractors and Subcontractors: Contracts.** An employer of an independent contractor may, without changing the status of the parties, exercise such control as is necessary to assure performance of the contract in accordance with its terms.

4. **Contractors and Subcontractors: Negligence: Invitor-Invitee.** The general contractor, in control of the premises where work performance under a contract with the owner is being carried out, owes a duty to persons rightfully on the premises to keep the premises in a reasonably safe condition while the contract is in the course of performance.
5. **Contracts: Contractors and Subcontractors: Master and Servant.** Under the terms of the construction contract here involved, including the general conditions contained in AIA document A201, April 1970 edition, especially the provisions relating to initiating, maintaining, and supervising all safety precautions and programs in connection with the work, including those with reference to safety and cleanup, the relationship of owner and independent contractor was not converted to that of master and servant.
6. **Negligence: Evidence.** Where different minds may reasonably draw different conclusions or inferences from the evidence adduced concerning the issues of negligence or contributory negligence and the degree thereof when one is compared with the other, such issues must be submitted to the jury.

Appeal from the District Court for Douglas County: THEODORE L. RICHLING, Judge. Reversed and remanded.

John A. Rickerson of Rickerson & Welch for appellant Lueder.

Sam R. Brower of Swarr, May, Smith & Andersen for appellant Hormel and Co.

Warren C. Schrempp and John H. Hanley for appellee.

Heard before KRIVOSHA, C.J., BOSLAUGH, MCCOWN, CLINTON, BRODKEY, WHITE, and HASTINGS, JJ.

CLINTON, J.

This appeal arises from an action in the District Court for Douglas County by Gerald T. Sullivan, plaintiff (hereinafter Sullivan), against Geo. A. Hormel and Company, a corporation (hereafter Hormel or owner), and Lueder Construction Company, a corporation (hereafter Lueder or general contractor), for damages from personal injuries alleged to have been caused by the negligence of the two defendants and which occurred upon the premises where Hormel

was constructing an addition to the Hormel plant. At the close of all the evidence, the court denied the separate motions of Hormel and Lueder for a directed verdict, granted the motion of Sullivan for a directed verdict against both defendants on the issue of liability, and submitted to the jury only the issues of whether the negligence was the proximate cause of the injury and, if so, the amount of damages. The jury returned a verdict for Sullivan against both the owner and the general contractor.

On December 14, 1972, Sullivan was employed as a millwright by Citrus Machinery Company, Inc., which, on that date, was installing a conveyor system in the addition upon which the general contractor was still working. As Sullivan was leaving the building that day, at about 4:20 p.m., his right foot slipped on icy steps, striking the next step with some force and bruising the heel of that foot. This bruise is alleged to have lighted up a latent case of Buerger's disease which later resulted in the amputation of Sullivan's right leg below the knee.

The petition alleged the sole and proximate cause of Sullivan's "fall" was the negligence of the defendant Lueder in one or more of the following particulars:

"A) In failing to keep said construction site premises in a safe manner for workers at said site.

"B) In failing to instruct its employees to keep the steps upon which plaintiff fell, free from debris and ice so as to avoid injuries to workers at said site.

"C) In failing to clear and clean debris and ice from the steps on which plaintiff fell when it knew or should have known that the ice and debris on said steps posed a hazard for workers at said site.

"D) In allowing workers at said site only one means of ingress and egress to and from said plant before and after working hours."

It further alleged the negligence of Lueder was imputable to Hormel under the doctrine of respondeat superior.

Both Hormel and Lueder have appealed and made various assignments of error. As to Hormel, we need take note of only one, namely, it is asserted that the record, as a matter of law, establishes that the relationship of Hormel and Lueder was that of owner and independent contractor and Hormel was not liable under the doctrine of respondeat superior. As to Lueder, we must take note of the following assignments: The court erred in ruling that Lueder was negligent as a matter of law and in not submitting to the jury the issue of Sullivan's contributory negligence.

As to Hormel, we reverse and direct dismissal. As to Lueder, we reverse and remand for a new trial.

With certain exceptions, which it is not necessary to notice here, the employer of an independent contractor is not liable for physical harm caused to another by the acts or omissions of the contractor or his servants. *Merten v. Pedersen*, 199 Neb. 34, 255 N.W.2d 869 (1977); Restatement (Second) of Torts § 409 (1965). The term "independent contractor" includes building contractors erecting a building for a fixed sum according to specifications and not subject to the owner's control over the method of accomplishment. *Hand v. Rorick Constr. Co.*, 190 Neb. 191, 206 N.W.2d 835 (1973); *Simon v. Omaha P. P. Dist.*, 189 Neb. 183, 202 N.W.2d 157 (1972); Restatement (Second) of Agency, Introductory Note § 218 at 480-81 (1958). An employer of an independent contractor may, without changing the status of the parties, exercise such control as is necessary to assure performance of the contract in accordance with its terms. *Stephens v. Celeryvale Transport, Inc.*, 205 Neb. 12, 286 N.W.2d 420 (1979). A general contractor, in control of the premises where work performance under a contract with the owner is being carried out, owes a duty to persons rightfully on the premises to keep the premises in a reasonably safe condition while the contract is in the course of performance. *Hand v. Rorick Constr. Co., supra.*

The contract between Hormel and Lueder called for the construction by Lueder for Hormel for a specified sum a grocery products addition at 900 S. Platte Avenue, Fremont, Nebraska, in accordance with certain drawings and specifications incorporated into the contract by reference. The construction constituted an addition to Hormel's existing plant and the contract provided that the work be done in four phases, the order of construction of the various phases of the addition being specified. The steps where the accident occurred provided ingress and egress for the employees of the contractor or subcontractors and were a portion of the area designated C on the plot plan.

Also incorporated in the contract were certain general conditions. These general conditions were contained in AIA document A201, April 1970 edition. Article 10 of the general conditions made the contractor responsible for "initiating, maintaining and supervising all safety precautions and programs in connection with the Work," as well as requiring it to take all reasonable safety precautions for the safety of all employees on the work and all other persons who might be affected thereby. Paragraph 10.2.2 provided: "The Contractor shall comply with all applicable laws, ordinances, rules, regulations and lawful orders of any public authority having jurisdiction for the safety of persons or property or to protect them from damage, injury or loss. He shall erect and maintain, as required by existing conditions and progress of the Work, all reasonable safeguards for safety and protection, including posting danger signs and other warnings against hazards, promulgating safety regulations . . . ." Article 4 provided in part:

"4.3 SUPERVISION AND CONSTRUCTION PROCEDURES

"4.3.1 The Contractor shall supervise and direct the Work, using his best skill and attention. He shall be solely responsible for all construction means, methods, techniques, sequences and procedures and for co-

ordinating all portions of the Work under the Contract.
"4.4 LABOR AND MATERIALS
"4.4.1 Unless otherwise specifically noted, the Contractor shall provide and pay for all labor, materials, equipment, tools, construction equipment and machinery, water, heat, utilities, transportation, and other facilities and services necessary for the proper execution and completion of the Work."

The contract designated Hormel's engineering division as its architect. The general conditions provided that the architect should have access to the "Work"; further providing: "The Architect will make periodic visits to the site to familiarize himself generally with the progress and quality of the Work and to determine in general if the Work is proceeding in accordance with the Contract Documents. On the basis of his on-site observations as an architect, he will keep the Owner informed of the progress of the Work and will endeavor to guard the Owner against defects and deficiencies in the Work of the Contractor. The Architect will not be required to make exhaustive or continuous on-site inspections to check the quality or quantity of the Work. The Architect will not be responsible for construction means, methods, techniques, sequences or procedures, or for safety precautions and programs in connection with the Work, and he will not be responsible for the Contractor's failure to carry out the Work in accordance with the Contract Documents." The general conditions also included the following:
"4.16 CLEANING UP
"4.16.1 The Contractor at all times shall keep the premises free from accumulation of waste materials or rubbish caused by his operations. At the completion of the Work he shall remove all his waste materials and rubbish from and about the Project as well as all his tools, construction equipment, machinery and surplus materials, and shall clean all glass surfaces and leave the Work 'broomclean' or its equivalent,

except as otherwise specified.

"4.16.2 If the Contractor fails to clean up, the Owner may do so and the cost thereof shall be charged to the Contractor as provided in Paragraph 3.4." Paragraph 3.4 pertains to the owner's right to carry out the work, and paragraph 3.4.1 states: "If the Contractor defaults or neglects to carry out the Work in accordance with the Contract Documents or fails to perform any provision of the Contract, the Owner may, after seven days' written notice to the Contractor and without prejudice to any other remedy he may have, make good such deficiencies. In such case an appropriate Change Order shall be issued deducting from the payments then or thereafter due the Contractor the cost of correcting such deficiencies, including the cost of the Architect's additional services made necessary by such default, neglect or failure. The Architect must approve both such action and the amount charged to the Contractor. If the payments then or thereafter due the Contractor are not sufficient to cover such amount, the Contractor shall pay the difference to the Owner."

The trial judge made a finding that, as a matter of law, the relationship between Hormel and Lueder, at least insofar as safety measures and cleaning up were concerned, was that of master and servant and that the evidence of Lueder's negligence with respect to those matters was imputable to Hormel. In so doing, he seemed to rely upon the fact that the inspecting architect was an employee of Hormel, rather than one retained by Hormel under the terms of a contract for preparation of plans and specifications or other contract, and the provision for cleanup contained in the general conditions of the contract which we have earlier cited. The court did not cite any authority for this construction of the contract, and neither does Sullivan.

Sullivan relies upon our holding in the case of *Simon v. Omaha P. P. Dist.*, 189 Neb. 183, 202 N.W.2d 157 (1972). In that case we held: "The duty of an owner

in control of the premises where work performance under a contract with the owner is to be executed is to exercise reasonable care to keep the premises in a safe condition while the contract is in the course of performance . . . . The possessor of land retaining control is subject to liability for personal injuries to business visitors caused by a natural or artificial condition thereon if he knows, or by the exercise of reasonable care could discover, the condition which, if known to him, he should realize as involving an unreasonable risk of harm to the invitee." (Syllabi of the court.) *Simon v. Omaha P. P. Dist., supra,* is distinguishable under the evidence in the case before us. In *Simon,* the owner was liable because of its own negligence and that of its agent. In that case, O.P.P.D. let no general contract; it maintained control of the premises under construction and controlled and supervised the work of the various contractors through its agent and engineering firm which it had retained for that purpose. In *Hand v. Rorick Constr. Co.,* 190 Neb. 191, 206 N.W.2d 835 (1973), we had occasion to so distinguish the *Simon* case. We there said at 194-95, 206 N.W.2d at 837: "The plaintiff relies upon, among other cases, our holding in *Simon v. Omaha P. P. Dist.,* 189 Neb. 183, 202 N.W.2d 157, which was decided after the trial of this case. Our holding there is clearly distinguishable. In that case the instrumentality which caused the injury was a condition of the premises and the failure of the owner, who was its own general contractor and was in absolute control of the premises through its retained engineer (to whom it had entrusted implementation of safety measures), to cover or barricade an opening as required by the safety code. The condition had existed for many months. The owner and its agent, who had complete control of all safety on the premises, had the right, opportunity, and duty to cover or barricade the opening. This was not the subcontractor's obligation."

In the case at hand, the evidence shows that Hormel did not retain control of the premises, nor assume responsibility for safety measures. The evidence is that, although on December 14, 1972, the "area C" was entirely enclosed, the general contractor was in possession of the premises; that some minor items remained to be finished; and that the final cleanup of that area was in progress. The "work" on the general contract was not completed until August 10, 1973, and possession delivered to the owner sometime after that date.

We have made an extensive search for precedent holding that under the contract provisions relied upon by the trial court in this case the relationship between the owner and the independent contractor created the relationship of master and servant even for the limited purpose of cleanup or safety. We have found none, and none of the parties cite any authority on point. The fact that the inspecting architect was an employee of the owner rather than one otherwise retained is not significant. The architect is the agent of the owner in either case. The question is, what is his authority. Where the inference is clear that there is or is not a master and servant relationship, the determination should be made by the court as a matter of law. *Peetz v. Masek Auto Supply Co.*, 161 Neb. 588, 74 N.W.2d 474 (1956); *Vontress v. Ready Mixed Concrete Co.*, 170 Neb. 789, 104 N.W.2d 331 (1960); *Stephens v. Celeryvale Transport, Inc.*, 205 Neb. 12, 286 N.W.2d 420 (1979).

We hold that under the contract before us, and in particular the contract provisions we have cited, especially those with reference to safety and cleanup, the relationship of owner and independent contractor was not converted to that of master and servant. The emphasis is on the term "independent," not the term "contractor." See Restatement (Second) of Agency, Introductory Note § 218 at 480-81 (1958), which we cited earlier. The negligence of Lueder was, therefore, not imputable to Hormel.

We now turn to the question of whether the court was correct in directing a verdict for Sullivan on the issue of liability, rather than submitting the issues of Lueder's negligence and Sullivan's possible contributory negligence to the jury.

Sullivan was employed at the Hormel plant addition from sometime in September 1972 until late January 1973. It is undisputed that the means of ingress and egress for the workmen of all trades employed in the constructing and equipping of the addition was through the door, landing, and stairs where the accident occurred. Sometime in November 1972 there had been a snowstorm, apparently followed by other storms. Witnesses, whose testimony was not contradicted, stated that on December 14 the landing was snow covered and the steps were covered with ice. According to some of the testimony, including Sullivan's, the icy conditions had existed continuously from the time of the November 1972 storm until the date of the accident. The steps had never been cleaned during that period. According to one of the witnesses, the conditions existed off and on during that period. Complaints had been made about the condition of the steps to Lueder's superintendent by Sullivan and others. Sullivan was the millwright foreman for Citrus and some of Sullivan's men had complained to him. The Lueder superintendent, however, denied receiving such complaints or that he had any responsibility with reference to keeping them in safe condition for use. He felt this way because, in his judgment, they were finished on that part of the building. There was some testimony that on one occasion sand had been spread in the area following an ice storm which occurred sometime prior to December 14. At the time of that storm, one workman had slipped and fallen on the ice after descending the stairway and stepping on the ground. The sanding apparently occurred after that incident. There was also testimony that salt and sand were available in containers at the doorway on

December 14, but no evidence that the stairway had been sanded or salted on December 14 or on any date other than as above mentioned. One witness described the ice on the steps on the date of the accident as being "mounded" from repeated thawing and freezing.

Approximately 25 or 30 workmen were on the job on December 14 and the inference is that all were using the same means of ingress and egress.

The exit in question was located on the east side of the addition and consisted of a metal door of ordinary width at floor level. The door opened onto an exterior platform which was connected with six steps located adjacent to and parallel to the building and descending to a concrete slab at ground level. The outer edges of the landing and steps were guarded by a handrail constructed of 1½- to 2-inch welded pipe, consisting of posts and a double rail.

Sullivan and three other workmen who left with him at the same time that day were all aware of the icy condition of the steps.

Sullivan testified that when he went to work on the morning of December 14, he entered through the designated entry. The steps were icy and there was debris on them. "There was always paper, plastic, nuts or bolts or something like that." Immediately adjacent to the landing (i.e., within about 2 feet) to the south of the door assigned to the workmen was an overhead loading door. Sullivan testified that Lueder's cleanup people would pile debris of various kinds, to wit, lumber, plastic, paper, nuts and bolts, in the building next to the door until there was an accumulation big enough to load. Then a truck would be backed to the doorway and Leuder's laborers would scoop the debris into the truck. Sometimes they were careless and missed the truck and some of it would get on the stairway.

At this point we describe the accident by summarizing and quoting Sullivan's testimony. He and three other workmen left at the same time at about 4:20

p.m. He took hold of the railing with his right hand and began to descend the stairs. He stated: "I just stepped down on a step and there was a bolt there and it rolled with me and I just hit my heel on the next step down. I didn't fall down; I just hit my foot. Q. Did the bolt move? A. Yes. It rolled down to the next step and then when my heel fell on it, well, it was there, so I stopped Richard and Hugh and Floyd and I picked the bolt up and threw it over on the railroad tracks." The heel of his right foot hit the bolt. The bolt was in the ice "halfway frozen," i.e., half of it in the ice. He had not seen the bolt before he stepped on it. It was a bolt about ⅜ x 3 inches in size. He had no idea how long the bolt had been there. Another witness also testified that at various times there was debris of various types on the steps.

Sullivan testified that he was the first of the workmen to descend the steps.

We have frequently held: "Where different minds may reasonably draw different conclusions or inferences from the evidence adduced concerning the issues of negligence or contributory negligence and the degree thereof when one is compared with the other, such issues must be submitted to the jury." *Maxwell v. Lewis*, 186 Neb. 722, 726, 186 N.W.2d 119, 122 (1971). See, also, *Jensen v. Hawkins Constr. Co.*, 193 Neb. 220, 226 N.W.2d 346 (1975); *Swiler v. Baker's Super Market, Inc.*, 203 Neb. 183, 277 N.W.2d 697 (1979); *Graham v. Simplex Motor Rebuilders, Inc.*, 189 Neb. 507, 203 N.W.2d 494 (1973).

As to the negligence of Lueder, it is clear that Lueder had a duty, not only under the terms of the contract but also at common law, as the independent contractor in possession and control of the premises to keep those premises in such condition that they afforded a reasonably safe place to work for persons working on or otherwise rightfully on the premises. *Hand v. Rorick Constr. Co.*, 190 Neb. 191, 206 N.W.2d 835 (1973); *Simon v. Omaha P. P. Dist.*, 189 Neb. 183,

202 N.W.2d 157 (1972). The facts showing that Lueder violated that duty are not in dispute. The evidence shows that the workmen were restricted to the use of the one entryway. The icy condition of the entryway steps had existed for a prolonged period of time. The general contractor had, or ought to have had, notice of the condition and did nothing at all to remedy an easily correctable unsafe condition. It is undisputed that at least frequently, if not always, debris, which made footing even more hazardous, was present on the steps. It is clear, therefore, that Lueder did not fulfill its obligation of keeping that part of the premises under its control under a reasonably safe condition. The court was, therefore, correct in directing a verdict against Lueder on the issue of that defendant's negligence.

As to Sullivan's negligence and its degree as compared with that of Lueder's, there are matters on which minds might reasonably differ. It is a reasonable inference from the evidence, including Sullivan's own testimony, that the ice alone would not have caused the accident, but that the presence of the bolt was necessary for the slip to have occurred. It is clear from Sullivan's testimony that he not only knew of the icy condition but also that debris was, at least frequently, on the exit way. According to his own words, there was "always" debris on the steps. Many persons were using the steps on that same day, as the evidence indicates that 25 or 30 workmen were on the job, and it may be inferred that they negotiated the steps safely. Sullivan acknowledged that he did not see the bolt before he stepped on it. It appears that reasonable minds could arrive at the conclusion that he did not see the bolt because he was not maintaining a reasonable lookout for debris which he should have known was very likely to be there, and that the slip could have been avoided by a more careful lookout and placement of his feet as he descended the stairs. The trial court should, therefore, have submitted to the jury the question of Sullivan's contributory negligence

in the above respect and given the usual comparative negligence instruction.

We direct that the judgment be reversed as to the defendant Hormel and the cause dismissed; and that as to defendant Lueder, the judgment be reversed and the cause remanded for a new trial with appropriate instructions to the jury in accordance with this opinion.

REVERSED AND REMANDED.

WHITE, J., dissenting.

I dissent from that portion of the majority opinion reversing the District Court's directed verdict in favor of the plaintiff on the issue of his contributory negligence.

The majority feels that reasonable minds could differ as to whether Mr. Sullivan was negligent in descending the steps, since he did not see the bolt before he stepped on it. However, even as the majority notes, "25 or 30 workmen were on the job, and it may be inferred that they negotiated the steps safely." The fact that there were no falls on these steps on December 14, 1972, prior to plaintiff's fall would lead him to assume, and reasonably so, that no greater amount of care was necessary in his descent of the icy steps than the precautions which he did take, i.e., a slow descent and gripping the handrail tightly, as the District Court noted; that even though he slipped, he did not fall but maintained his balance when his foot hit the next step. While the previous 25 or 30 descents may have loosened the bolt sufficiently to cause it to break free during Mr. Sullivan's descent, this does not suggest Sullivan's negligence but relates to the undisputed negligence of defendant Lueder in allowing the bolt to be on the steps in the first place. Therefore, I would affirm the District Court on the issue of the plaintiff's contributory negligence.

KRIVOSHA, C.J., joins in this dissent.

EMPLOYERS INSURANCE OF WAUSAU, APPELLEE, V. GREATER OMAHA TRANSPORTATION COMPANY, A CORPORATION, APPELLANT, AND DANIEL J. PECORARO, APPELLEE.

303 N.W.2d 282

Filed March 13, 1981. No. 43238.

1. **Workmen's Compensation: Employer and Employee.** A Workmen's Compensation Court determination of employee status, not independent contractor, is affirmed where substantial evidence supports the conclusion and it is not clearly wrong.
2. _____:_____. Under the facts of the case, an injured cabdriver is an employee of the cab company and entitled to workmen's compensation benefits even though written arrangement is denominated a lease of the cab rather than an employment contract.

Appeal from the Nebraska Workmen's Compensation Court. Affirmed.

Frost & Meyers for appellant.

John R. Timmermier of Schmid, Ford, Mooney & Frederick for appellee Employers Ins.

Mary Cannon Veed and Stephen L. Gerdes of Matthews & Cannon, P.C., for appellee Pecoraro.

Heard before BOSLAUGH, CLINTON, and BRODKEY, JJ., and REIMER and HIPPE, District Judges.

HIPPE, District Judge.

The question in this case is whether a cabdriver, operating under a lease, is entitled to workmen's compensation benefits. The Nebraska Workmen's Compensation Court held that he was, and we affirm.

Employers Insurance of Wausau brought this action. They had written a policy of workmen's compensation insurance to Greater Omaha Transportation Company. On January 1, 1979, Daniel J. Pecoraro was injured while driving a leased cab. The insurance company took the position that Pecoraro was entitled to benefits as an employee; the transportation company claimed that the lease arrangement established

independent contractor status and Pecoraro was not entitled to benefits. Pecoraro cross-claimed as a defendant, claiming benefits.

The transportation company's affiliates held two certificates of public convenience and necessity from the Nebraska Public Service Commission. Both authorized the operations of taxicabs in Omaha, Nebraska, and vicinity. One was in the name of Yellow Cab Company — the other was Checker Cab Company. Both were issued on April 10, 1978. To provide that service, Greater Omaha had about 40 employees for clerical, dispatching, and maintenance functions. They owned, maintained, and insured a number of taxicabs. To secure drivers, Greater Omaha prepared a "menu of leases." This offered leases of cabs on a variety of bases, ranging from 8 hours to 1 week.

The defendant Dan Pecoraro, along with Nellie Burris, had a 1-week lease. Each would pay one-half on 12-hour shifts. The lease would be paid at the end of a shift from fares received, or from personal funds if fares were insufficient. The excess or deficiency of fares over the set lease charge, plus cost of gas, would be the driver's profit or loss. The lease could be terminated or renewed by either party at the end of a week.

A system of radio communications was established so that calls for cabs would come to Greater Omaha's central office. The fare would be offered to all cabs and they would bid for it. The dispatcher decided who would make the pickup. There were also central stands at different locations where the drivers could wait in line to pick up fares. If he had enough of his own business, a driver could theoretically function without bidding or using the stands, but no examples of any drivers like that were pointed out.

The lease itself asserted that Greater Omaha exercised no control over drivers and that drivers were independent contractors, not employees. The totality of the circumstances between the company and Pecoraro was a subject of disagreement in the testi-

mony. Jerry C. Wilson, the company's president, described the company's control as nonexistent. Daniel Pecoraro, on the other hand, testified to experience over many years with various employee arrangements and the lease involved here. He described the difference between the various arrangements as nonexistent.

Upon our review of the record, there are some aspects of the arrangement which preponderate toward either conclusion. The determination of status as an employee, on the one hand, or as independent contractor, on the other, is a fact question for the trier of fact. The review is to see if sufficient competent evidence warrants the factfinder's conclusion. Such a conclusion will not be set aside unless clearly wrong. *Williams v. Williams Janitorial Service*, 207 Neb. 344, 299 N.W.2d 160 (1980).

The compensation court found that the company exercised control over its lessee-drivers. There was substantial evidence tending to show that an operations guide and memoranda to drivers regulated their operations. The guide is 40 pages of comprehensive instructions about procedures covering every aspect of the driver's job. A separate communications guidebook contains a map of city areas showing cab stand locations and two-way radio procedures for pickups at those locations. A new driver rode with an experienced one at the beginning of his period to learn company procedures. The teacher got a discount on his lease for teaching. A driver also got a lease adjustment if he did not take his cab out because of an excused absence. Although the evidence does not show examples of anyone being discharged for violating any rules, the inference can be made that the lessee-drivers conformed their operations to the guidebook-memoranda rules.

The materials, or tools of the trade, were furnished by the company. The lease required the personal service of the lessee; he could not sublease. The ar-

rangement was terminable by either party each week similar to an employer-employee arrangement. The worker is not in a distinct occupation, because the company held the certificate of public convenience to provide cab services, and the lessee did that work. The type of work is usually done without supervision whether the arrangement was lessee or employee, and the skill required on the job is such that it can be done by employees rather than specially skilled independent workmen.

All the above factors, along with the critical factor of control, tend to establish an employee status. The only factors supporting an independent contractor status are that no withholdings are made from pay and the method of payment, which places the gross income with the driver and a fixed lease payment to the company.

Stephens v. Celeryvale Transport, Inc., 205 Neb. 12, 286 N.W.2d 420 (1979), is relied upon by Greater Omaha as controlling. That case involved an interstate freight carrier lease with an owner of a truck-tractor. The written contract denominated an independent contractor status, all of its terms indicated such a relationship, and the way the agreement was carried out did not indicate an employee relationship. Under such facts, the owner was held to be an independent contractor as a matter of law, and an employee holding by the Workmen's Compensation Court was reversed. That case is different from this one because, here, the total arrangement indicates an employee status, not an independent contractor. In the *Stephens* case, the owner was undertaking work with control asserted only over the result of the work and with no control over the method or means to be used. Here, the evidence can be read otherwise; thus, this case should not be decided as a matter of law.

The factors we have outlined in analyzing the total arrangement are taken from *Voycheske v. Osborn*, 196 Neb. 510, 244 N.W.2d 74 (1976). That opinion

comprehensively outlines the analysis and questions to ask in making an employee-independent contractor determination. The Workmen's Compensation Court used the same analysis. We conclude there was substantial evidence to support its finding, and that it was correct in its conclusion. The decision is accordingly affirmed.

The employee, Pecoraro, is awarded an additional $500 attorney fee for this appeal, to be paid by the employer since no reduction in the award was made.

AFFIRMED.

REGINA A. BELITZ, APPELLEE, V. MARVIN G. SUHR, APPELLANT.

WILLIAM L. BELITZ, APPELLEE, V. MARVIN G. SUHR, APPELLANT.

303 N.W.2d 284

Filed March 13, 1981. Nos. 43250, 43251.

1. **Motions for New Trial: Appeal and Error.** Where a trial court judge sustains a motion for a new trial without specifying his reasons therefor, the appellant fulfills his burden by submitting the records to the Supreme Court and contending there is no prejudicial error. The burden shifts to the appellee to identify any prejudicial error in the record justifying a new trial.
2. **Motor Vehicles: Expert Witnesses: Evidence.** An expert, properly qualified, may give an opinion as to the speed of vehicles involved in an automobile accident. However, neither an expert nor lay witness may testify as to his opinion of speed based solely on the fact that a collision occurred.
3. **Witnesses: Evidence.** The function of the lay witness is to describe what he has observed and the trier of fact will draw the conclusion from the facts observed and reproduced by the witness.
4. **Jury Instructions.** A party may not complain that a court erroneously rejected his requested instructions when the substance of the instructions requested is contained in other instructions given by the court.

Appeal from the District Court for Douglas County: JERRY M. GITNICK, Judge. Affirmed.

Hansen & Engles, P.C., for appellant.

James R. Welsh of Welsh, Sibbernsen & Bowen for appellees.

Heard before KRIVOSHA, C.J., MCCOWN, CLINTON, BRODKEY, WHITE, and HASTINGS, JJ., and RONIN, Retired District Judge.

WHITE, J.

This is an appeal from the District Court from an order granting a motion for new trial after trial to a jury and verdict for the defendant in each of the two cases. The causes of action arose as the result of a collision which occurred on West Maple Road approximately 2½ miles west of Omaha, Douglas County, Nebraska, on February 20, 1978.

The undisputed facts in the case appear to be these: The plaintiff husband was traveling east in his own lane on West Maple Road and had passed the Douglas County Hospital Annex driveway. The day was windy and, while most of the road was not snow covered, there were areas where the wind was blowing snow across the highway, causing drifting. Such an area occurred immediately east of the driveway where it appears that the snow had started to drift across the road, blocking the westbound lane of West Maple Road. According to plaintiff's version, he approached the area and had visibility of approximately 50 feet. He did not see the defendant's automobile. The plaintiff's vehicle was struck on the left side while the plaintiff's vehicle was entirely in its own lane of traffic. The defendant testified that as he approached the area, he slowed his vehicle, that there was blowing snow across the highway, and that he did not see the plaintiff's vehicle prior to the collision.

At the conclusion of all the evidence, the matter was submitted to the jury and the verdict was for the defendant, finding that the plaintiff husband's cause of action for personal injuries, as well as the

plaintiff wife's cause of action for loss of consortium, should be dismissed. The defendant had received the favorable verdicts in the District Court and appeals from the order granting the motion for new trial.

Defendant points out that the trial court in its order sustaining the motion for new trial did not set forth the reasons for its decision. He calls our attention to the line of cases which indicate that when the trial court grants a motion for new trial without stating its reasons, the appellant fulfills his burden by submitting the records to the Supreme Court with the contention that there is no prejudicial error; the burden then shifts to the appellee to identify any prejudicial error in the record which justified the trial court's decision in sustaining the motion for new trial, citing *Greenberg v. Fireman's Fund Ins. Co.*, 150 Neb. 695, 35 N.W.2d 772 (1949).

The plaintiff, in response, suggests three errors committed by the trial court which establish that the trial court did not abuse its discretion in the order granting the new trial. *County of Hall ex rel. Wisely v. McDermott*, 204 Neb. 589, 284 N.W.2d 287 (1979). (1) The trial court erred in permitting the safety patrol officer to testify from his accident report concerning statements favorable to the defendant made by the defendant at the accident scene; (2) The trial court erred in permitting the officer to give his opinion with respect to the "contributing circumstances" of the accident and, in response thereto, to testify that both vehicles were traveling at an unsafe speed under the circumstances; and (3) The trial court erred in failing to properly instruct the jury on the plaintiff's theory of the case.

The safety patrol officer, Curtis Nielsen, was called as plaintiff's witness. On cross-examination he was asked the following question: "Would you read from your report what you wrote down that these individuals told you as to this occurrence, and bearing in mind that Number One is Mr. Belitz, Number Two is Mr. Suhr.

"MR. WELSH: I am going to object, Your Honor, as being hearsay as to Mr. Suhr, and also it is not the best evidence. He is here to testify. He is trying to get in a police report in a roundabout way.

"MR. ENGLES: No, I am not. He can testify as to what the man told him. If that refreshes the man's recollection, that is part of it.

"THE COURT: Objection is overruled."

The officer thereupon responded: "And Driver Number Two stated - -

"Q. That is Mr. Suhr?

"A. Yes, Mr. Suhr. Driver Number Two stated that he was westbound on Highway 64 when he came upon a section of the road which was badly drifted and had snow blowing across it. Mr. Suhr stated that he slowed up and that he could not see the oncoming vehicle, Mr. Belitz, through the blowing snow, and he then collided with the Belitz vehicle." The statement was offered by the defendant apparently for the purpose of proving the truth of the out-of-court assertion. To that extent it falls clearly within the definition of hearsay and under none of the exceptions. It is true that a certain portion of the statement may be damaging to Mr. Suhr, but a portion of it is also helpful to him, tending to establish or prove that he slowed down before entering the drifted area and, as such, is barred by Neb. Rev. Stat. § 27-801 (Reissue 1978). The defendant suggested that the rule allowing extended cross-examination is here involved or that the fact that the hearsay was written down and later used to refresh the witness' recollection renders the hearsay statement somehow admissible. It does not. The admission of the testimony of Officer Nielsen as to the defendant's conversation was erroneous.

The next assigned error relates to: "Q. And in preparing your official report and forming your conclusions in this particular accident, is there a portion of the formal report entitled contributing circumstances?

"A. Yes, there is.

"Q. And would you refer to that in your report, please. Did you note what, in your opinion, the contributing factors or circumstances were in this accident?

. . . .

"A. Yes.

"Q. (by Mr. Engles) Okay, and based upon your experience and training, what are, in your opinion, the contributing circumstances in the accident that we are describing in this lawsuit?

"MR. WELSH: I am going to object, Your Honor, as no proper and sufficient foundation. I feel that it is invading the Court's prerogative. Also the foundation has been shown through testimony that this officer and investigator didn't arrive until at least an hour afterwards, and that this would be sheer speculation on the part of this witness.

"MR. ENGLES: Your Honor, our rules of evidence permit me to question the officer not necessarily as a, quote, expert witness, but rather I can ask him opinions as a layman, and the rules specifically provide that, based on his perceptions, he may give an opinion.

"THE COURT: Objection is overruled.

"Q. (by Mr. Engles) You may refer to your report if you would like to, sir.

"A. I have got down contributing circumstances as exceeding safe speed. This is a little bit misleading, however.

"Q. Go ahead and lead us, then.

"A. It should probably read exceeding speed that is safe for the road conditions."

The testimony was offered as that of a lay witness, presumably under Rule 701 of the Rules of Evidence, Neb. Rev. Stat. § 27-701 (Reissue 1979): "If the witness is not testifying as an expert, his testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of his testimony or the determination of a

fact in issue." The question, then, is whether the testimony that both drivers were exceeding a safe speed was rationally based on the perception of the witness. The evidence discloses that the surface of the roadway was snow covered probably at the time of the accident and the north lane was drifted closed, making traffic difficult if not impossible; that the officer arrived at the scene of the accident; and that there was no testimony as to marks on the surface or that any marks were discernible. There is only the evidence of the photograph of the automobiles themselves showing damage to them and the testimony of the two occupants to the officer that neither saw the other prior to the collision. There is no question that an expert, properly qualified, may give an opinion as to the speed of the vehicles involved in an automobile accident, but we are unable to find any case in which, based solely on the fact of a collision, we have permitted anyone, expert or nonexpert, to testify as to speed. No attempt was made to suggest that the damage to the automobiles was indicative of a rapid rate of speed when the automobiles met. The subject was not even discussed in the examination. Under the Comment to the Proposed Nebraska Rules of Evidence, Rule 701 (1973), the commentary states at 107: "The present rule reflects the existing law of Nebraska. Limitation (a) has previously been a familiar requirement in Nebraska. It is based on the premise that the lay witness' function is to describe what he has observed and that the trier of fact will draw the conclusion from the facts observed and reproduced by the witness. *Benson v. Peters*, 87 Neb. 263, 126 N.W. 1003 (1910); *Riggs Optical Co. v. Riggs*, 132 Neb. 26, 270 N.W. 667 (1937)." In other words, as observed further in the Comment, "Limitation (a) is the familiar requirement of first-hand knowledge or observation." *Id.* at 107. The officer did not observe the collision and his basis of testifying as to unsafe speed cannot be said to be based on any rational perception of the

facts. To allow this testimony by a lay witness would make a mockery of our cases involving the foundational requirements that must, on attack, support the conclusion of an expert as to speed. The admission of the officer's testimony was clearly erroneous.

The third assignment of error discusses the requested instructions. The substance of all the requested instructions was given in the court's own instructions and a party may not be heard to complain when the substance of the instructions requested is contained in other instructions by the court.

We conclude that errors occurred in the admission of evidence sufficient to justify the District Court in the exercise of its discretion to grant a motion for new trial. The exercise of that discretion was not abused and the judgment of the trial court is affirmed.

AFFIRMED.

SUSAN GRACE BANKS SWEET AND EDDIE SWEET, WIFE AND HUSBAND, APPELLEES, V. MARGARET ANN BANKS FAIRBAIRN AND HOWARD FAIRBAIRN, HER HUSBAND, APPELLANTS.

303 N.W.2d 288

Filed March 13, 1981. No. 43262.

1. **Partition: Warranty Deeds.** The restrictive provisions of a warranty deed from a father to his children which provided that none of the grantees could mortgage any part of said lands except to one of the other grantees and giving each grantee the option to purchase a part of the land in the event one of the grantees should desire to sell his share, it being the intention of the grantor that said property remain within the family, are satisfied by the voluntary execution of warranty deeds by all the grantees to the grandchildren of the original grantor. Thus, there is no bar to an action in partition between the two grandchildren of the original grantor.
2. **Partition: Attorney Fees.** If the shares confirmed by the judgment in partition and the existence of all encumbrances of which the plaintiff had actual or constructive notice were accurately pleaded in the original

petition of the plaintiff, attorney fees shall be awarded entirely to the attorney for the plaintiff. This amount as well as a reasonable fee for the referee shall be taxed as costs in the proceedings.

3. **Partition: Fees: Appeal and Error.** The amount of attorney fees and the amount of referee fees rest in the sound judicial discretion of the trial court and will not be disturbed on appeal in the absence of an abuse of discretion.

Appeal from the District Court for Kimball County: JOHN D. KNAPP, Judge. Affirmed.

Philip T. Morgan of Morgan & Morgan for appellants.

Leo F. Clinch and Van Steenberg, Myers & Burke for appellees.

Heard before KRIVOSHA, C.J., MCCOWN, WHITE, and HASTINGS, JJ., and MURPHY, District Judge.

MURPHY, District Judge.

This is an appeal by the defendants from a judgment of the District Court of Kimball County, by which the trial court ordered partition of real estate in kind and awarded attorney fees to the plaintiffs' attorney in the sum of $4,200 and a referee fee in the sum of $1,800, both taxable as costs to be paid one-half by the plaintiff Susan Grace Banks Sweet and one-half by the defendant Margaret Ann Banks Fairbairn.

The subject of this controversy is 160 acres of land in Kimball County with an approximate value of $60,000. The plaintiff Susan Grace and the defendant Margaret Ann are sisters, and each were owners of an undivided one-half interest in the 160 acres in question. The ownership and the value of the land are not in dispute.

The land in question was part of a conveyance from Henry C. Furst to his children in 1946. One of these children was the mother of the two sisters who are parties to this action. This deed contained the following restrictive language: "This conveyance is made with the understanding that none of the grantees herein

may mortgage any part of said lands except to one of the other grantees herein or to Henry M. Furst, a son of the grantor, and that, in the event of the sale of the portion of the grantees or any of them, the remaining grantees, or any of them, or Henry M. Furst, a son of the grantor, shall have the option to purchase the share of the grantee selling, at the reasonable or going value of said share at the time of sale. The intention being to retain said property within the family."

In March 1961 the children of Henry C. Furst executed a warranty deed to the real estate in question to the parties to this action as tenants in common, in equal shares, reserving a life estate in the mother of the parties, Marie Furst Banks. Marie Furst Banks died prior to the filing of this action in partition.

This action arose when the plaintiff Susan Grace filed a petition and amended petition alleging a 50 percent ownership in the property and a like interest in her sister, the defendant Margaret Ann, and prayed for "judgment confirming the shares of the parties . . . and for a partition of said real estate according to the respective rights of the parties interested therein, or if the same cannot be equitably divided, that said premises may be sold and the proceeds thereof be divided between the parties according to their respective rights and for such other and further relief as equity may require."

After special appearances were overruled the defendants filed an answer, alleging that the plaintiff Susan Grace was not entitled to partition because of the restrictive covenant in the deed of 1946. In her answer the defendant Margaret Ann prayed that the petition be dismissed and that, if partition were ordered, it be in kind.

On plaintiffs' motion for judgment on the pleadings and for summary judgment, the trial court found that the restrictive language in the deed had been satisfied and in the alternative was void. The court further found that there was no genuine issue as to any material

fact and that the plaintiffs were entitled to judgment as a matter of law. A referee was appointed and filed a report recommending partition in kind. The court approved the report and directed partition in kind. Thereafter, the trial court held a hearing in regard to attorney fees, referee fees, and taxing of costs. The plaintiffs' attorney was awarded a fee of $4,200 and the referee a fee of $1,800, and the fees were taxed one-half to the plaintiff Susan Grace and one-half to the defendant Margaret Ann.

The judgment of the trial court is affirmed.

The appellants assert that the court erred in allowing partition. The trial court correctly ruled that the 1961 conveyance of the 160 acres in question by the children of Henry C. Furst to the parties to this action as tenants in common satisfied the restrictive language in the 1946 deed of Henry C. Furst. Therefore, the question of whether that restriction is void by reason of public policy is not at issue and need not be decided.

The appellants assert that the trial court erred in awarding a fee of $4,200 to plaintiffs' attorney and a referee fee of $1,800, and in ordering both fees taxed one-half to the plaintiff Susan Grace and one-half to the defendant Margaret Ann.

In making a determination in regard to attorney fees and fees for the referee, the trial court correctly construed the provisions of Neb. Rev. Stat. § 25-21,108 (Reissue 1979): "If, in the proceedings in partition, judgment shall be entered directing partition, as provided in section 25-2179, the court shall, after partition or after the confirmation of the sale and the conveyance by the referee, determine a reasonable amount of fees to be awarded to the attorneys of record in the proceedings, which amount shall be taxed as costs in the proceedings. *If the shares confirmed by such judgment and the existence of all encumbrances of which the plaintiff had actual or constructive notice were accurately pleaded in the original petition of the plaintiff, such fees for the attorney shall be awarded entirely to*

the attorney for the plaintiff; otherwise, the court shall order such fees for the attorneys to be divided among such of the attorneys of record in the proceedings as shall have filed pleadings upon which any of the findings in the judgment of partition are based. The court shall also determine and tax as costs a reasonable fee for the referee." (Emphasis supplied.)

In this case the shares confirmed by the judgment of the trial court were correctly pleaded in the original and amended petitions. Thus, the award of attorney fees for the plaintiffs' attorney was proper, having been mandated by the provisions of § 25-21,108.

The determination of the amount of the fee awarded to the plaintiffs' attorney and the amount of the referee fee rests in the sound discretion of the trial court and will not be disturbed on appeal in the absence of an abuse of discretion. *Snook v. Snook*, 184 Neb. 798, 172 N.W.2d 85 (1969); *Junker v. Junker*, 188 Neb. 555, 198 N.W.2d 189 (1972).

The plaintiffs' request for an additional fee to be allowed by the Supreme Court is denied, and the judgment of the District Court is affirmed.

AFFIRMED.

LARRY D. MILLER AND SHIRLEEN D. MILLER, APPELLEES, V. SCHOOL DISTRICT NO. 69 OF PAWNEE COUNTY, NEBRASKA, ET AL., APPELLANTS.

303 N.W.2d 483

Filed March 13, 1981. No. 43292.

1. **Schools and School Districts: Courts: Appeal and Error.** The action of the statutory board under Neb. Rev. Stat. § 79-403 (Reissue 1976) is an exercise of quasi-judicial power, equitable in character, and upon appeal therefrom to the District Court the cause is triable de novo as though it had been originally instituted in such court, and upon appeal from the District Court to this court it is triable de novo as in any other equitable action.

2. **Equity: Jurisdiction.** It is the general rule that if a court of equity has properly acquired jurisdiction in a suit for equitable relief, it may make complete adjudication of all matters properly presented and involved in the case and grant relief, legal or equitable, as may be required and thus avoid unnecessary litigation.
3. ____: ____. It is a common principle of equity that equity delights to do justice and that not by halves, and when equity once acquires jurisdiction it will retain it so as to afford complete relief.
4. **Equity.** Equity seeks the real and substantial rights of the parties, and applies the remedy in such manner as to relieve those having the controlling equities.
5. ____. Technicalities are not favorites of law or equity. Courts relish them as instruments to prevent injustice, but not to defeat justice.
6. ____. Equity looks through forms to substance, or as stated in similar language, a court of equity goes to the root of a matter and is not deterred by forms.
7. **Words and Phrases.** The word "void" means null; ineffectual; nugatory; having no legal force or binding effect; unable, in law, to support the purpose for which it was intended.
8. ____. The word "voidable" means that which may be avoided, or declared void; not absolutely void, or void in itself; that which operates to accomplish the thing sought to be accomplished, until the fatal vice in the transaction has been judicially ascertained and declared. It imports a valid act which may be avoided rather than an invalid act which may be confirmed.
9. ____. There is this difference between the two words "void" and "voidable": void in the strict sense means that an instrument or transaction is nugatory and ineffectual so that nothing can cure it; voidable exists when an imperfection or defect can be cured by the act or confirmation of him who could take advantage of it.
10. **Schools and School Districts: Accreditation.** Where all the acts necessary to effect accreditation of a school district have been met prior to the statutory board ordering the transfer, and in fact the formal certification is granted prior to the time the children begin school and prior to the time the District Court acts on the appeal, the issue of the accreditation of the new district must be considered to have become moot and the transfer deemed to be permitted on the question of accreditation.

Appeal from the District Court for Gage County: WILLIAM B. RIST, Judge. Affirmed.

Everson, Noble, Wullschleger, Sutter & Sharp for appellants.

Dalke & Smith for appellees.

Heard before KRIVOSHA, C.J., BOSLAUGH, MCCOWN, BRODKEY, WHITE, and HASTINGS, JJ.

KRIVOSHA, C.J.

The appellants, School District No. 69 of Pawnee County, Nebraska, and certain of its patrons, individually and as taxpayers, residents, and electors of said district (hereinafter jointly referred to as the Lewiston District), appeal from a judgment entered by the District Court for Gage County, Nebraska, upholding the decision of the statutory board consisting of the county superintendents, clerks, and treasurers of Gage County and Pawnee County, Nebraska, (Neb. Rev. Stat. § 79-403 (Reissue 1976)) approving and granting the transfer of certain real estate owned by appellees, Larry D. Miller and Shirleen D. Miller (Millers), from the Lewiston District to School District No. 166 of Gage County, Nebraska (Filley District). For reasons more particularly set out hereinafter, we affirm the judgment of the trial court.

The evidence discloses that the Millers own 160 acres of land in Gage County, Nebraska, where they, together with their two children, have resided for more than 6 years. The children, Nichole and Aaron, both attend school in the Filley District and during the 1979-80 school year were in second grade and kindergarten, respectively.

The Millers' residence is 5½ miles from the Filley school and 11 miles from the Lewiston school. The Millers' land was within the boundaries of the Lewiston District for at least 2 years prior to the commencement of this action, and the Millers therefore paid tuition to the Filley District during the 1977-78 and 1978-79 school years to allow Nichole to attend the Filley school. Both children attended the Filley school during the 1979-80 school year. The Lewiston District adjoins the Filley District, and prior to its transfer the Millers' land was within 1 mile from the

boundary of the Filley District. Each district is an accredited Class II school district (Neb. Rev. Stat. § 79-102(2) (Reissue 1976)), although at the time the statutory board authorized the transfer on March 2, 1979, the Filley District was not then an accredited school district.

The record further establishes that the Filley District had made application for accreditation prior to March 2, 1979, the date of the transfer by the statutory board, and had completed all requirements for accreditation, though in fact the accreditation had not yet been granted. On March 8, 1979, the accreditation committee of the State Department of Education evaluated the Filley District and ascertained that there was compliance with the accreditation requirements. By reason of statute (Neb. Rev. Stat. § 79-403.01 (Reissue 1976)) the order of the statutory board transferring the Millers' land to the Filley District was to be effective June 1, 1979. On June 8, 1979, the State Department of Education, upon receipt of the accreditation committee's certification that the Filley District had fulfilled all requirements and should be accredited, formally granted the Filley District accreditation status effective July 1, 1979.

On June 22, 1979, a petition was filed in the District Court for Gage County, Nebraska. In late August of 1979, when classes resumed for the 1979-80 school year, the Millers' children continued to attend school in the Filley District. Trial was had in this matter on November 13, 1979, and judgment entered by the District Court on January 14, 1980.

The record further establishes certain differences between the Lewiston District and the Filley District, including the fact that for the 1979-80 school year the Filley and Lewiston District enrollments were 151 students and 209 students, respectively. The Filley District had 16 teachers and the Lewiston District had 17 teachers. The Lewiston District maintains that, in fact, they had an additional kindergarten teacher

whose name was not listed on an exhibit submitted at the trial. It appears from the record, however, that the additional teacher whose employment is disputed was approved by the Lewiston District on the night prior to the trial in the District Court and was not to begin work until January of 1980. Likewise, the evidence discloses that the teaching faculty of the Filley District has more teachers than the Lewiston District who have earned post-graduate credits at each of several levels, including the obtaining of a master's degree.

In examining the role of the principals of the two districts, it appears that the principal of the Filley District spends over 70 percent of his time in performing his duties as principal, while the principal of the Lewiston District devotes two of seven periods each day teaching class, one period preparing to teach class, and four periods as librarian. It would appear that the Lewiston principal's administrative duties are incidental to her primary function as a classroom teacher and librarian.

The evidence further discloses that the Millers' son, Aaron, was enrolled in the Filley District's kindergarten program during the 1979-80 school year. The Filley District kindergarten program is conducted for one-half day during the entire school year, while the Lewiston kindergarten program is conducted on a full-day basis during just the spring semester. Further, Aaron has been diagnosed as having a speech problem and was receiving continuing speech therapy in the Filley District.

The Lewiston District maintains that the trial court erred in upholding the action of the statutory board for two specific reasons. The first reason was that the Millers failed to sustain their burden of proving that it was in their children's best educative interests to transfer their land from the Lewiston District to the Filley District. The second reason given by the Lewiston District is that the transfer was void because at the time the transfer was author-

ized on March 2, 1979, the Filley District was not then accredited, contrary to the provisions of Neb. Rev. Stat. § 79-1108 (Reissue 1976), which requires in part: "No transfer of property from an accredited school district to a nonaccredited school district of any class shall be permitted."

We shall examine the assignments of error raised by the Lewiston District in reverse order, looking first at Lewiston's contention that the transfer was invalid because of § 79-1108 which prohibits the transfer of land to a nonaccredited school district.

In analyzing this problem and arriving at an appropriate determination, we must first examine various rules and principles by which this appeal must be considered. "We have held that the action of the [statutory] board under section 79-403, R. R. S. 1943, is an exercise of a quasi-judicial power, equitable in character, and upon appeal therefrom to the District Court the cause is triable de novo as though it had been originally instituted in such court, and upon appeal from the District Court to this court it is triable de novo as in any other equitable action." *Klecan v. Schmal*, 196 Neb. 100, 108, 241 N.W.2d 529, 534 (1976). See, also, *Friesen v. Clark*, 192 Neb. 227, 220 N.W.2d 12 (1974). This, therefore, being an equitable action, we must likewise keep in mind the equitable principles under which such an action must be reviewed.

In particular, we note the following principles of equity which control our decision in this case. It is the general rule that if a court of equity has properly acquired jurisdiction in a suit for equitable relief, it may make complete adjudication of all matters properly presented and involved in the case and grant relief, legal or equitable, as may be required and thus avoid unnecessary litigation. See, *Kuhlman v. Cargile*, 200 Neb. 150, 262 N.W.2d 454 (1978); *Sechovec v. Harms*, 187 Neb. 70, 187 N.W.2d 296 (1971). Moreover, it is a common principle of equity that equity delights

to do justice and that not by halves, and when equity once acquires jurisdiction it will retain it so as to afford complete relief. See *Hardt v. Orr*, 142 Neb. 460, 6 N.W.2d 589 (1942). Further, "'[e]quity seeks the real and substantial rights of the parties, and applies the remedy in such manner as to relieve those having the controlling equities.'" *National Mortgage Loan Co. v. Hurst*, 120 Neb. 37, 39, 231 N.W. 519, 520 (1930). See, also, *Empson v. Deuel County State Bank*, 134 Neb. 597, 279 N.W. 293 (1938).

"Technicalities are not favorites of law or equity. Courts relish them as instruments to prevent injustice, but not to defeat justice." *Northwest Ready Roofing Co. v. Antes*, 117 Neb. 121, 219 N.W. 848 (1928) (syllabus of the court). See, also, *Yates v. New England Mutual Life Ins. Co.*, 117 Neb. 265, 220 N.W. 285 (1928). In *Darnell v. City of Broken Bow*, 139 Neb. 844, 854, 299 N.W. 274, 281 (1941), we said: "'Equity looks through forms to substance,' or as stated in similar language, 'A court of equity goes to the root of a matter and is not deterred by forms.'"

With these principles in mind, therefore, we now examine the applicable statutes to determine whether the fact that the Filley District was not formally accredited on March 2, 1979, but was fully accredited prior to the time the children started school in August of 1979 and prior to trial in this matter and prior to the time the court entered its judgment, nevertheless, precludes the transfer of the Millers' property from the Lewiston District to the Filley District. We must, of course, examine the applicable statutes involved because, while equity does indeed seek to do equity, nevertheless, equity follows the law. As we noted in *In re Petition of Ritchie*, 155 Neb. 824, 828, 53 N.W.2d 753, 756 (1952): "'A court of equity, in dealing with legal rights, adopts and follows the rules of law, in all cases to which those rules are applicable, and whenever there is an explicit statute or a direct rule of law governing the case in all its circumstances, a court of

equity is as much bound by it as would be a court of law.'"

The transfer of the Millers' land from the Lewiston District to the Filley District was made pursuant to the provisions of § 79-403, which we have previously held applies. Nothing found within that section requires that the district to which the land is attached must be accredited prior to the transfer. The parties appear to concede that but for the matter of accreditation all of the other formal requirements of the statute were fully met by the Millers at the time the application was filed. If, then, the absence of a formal certificate of accreditation voids the transfer, it must be found elsewhere. The only other applicable statute is § 79-1108, which we have previously held applies to all school districts. *Pribil v. French*, 179 Neb. 602, 139 N.W.2d 356 (1966). A reading of § 79-1108, however, makes it clear that the absence of accreditation does not make the transfer "void," but only "voidable."

Section 79-1108 provides in full as follows: "No transfer of property from an accredited school district to a nonaccredited school district of any class shall be permitted. Any action to set aside the transfer of property from an accredited school district to a nonaccredited school district shall be commenced within four years from the date of the transfer, *otherwise the transfer shall be valid as of the original date of the transfer.* This provision shall apply to all transfers made prior as well as subsequent to February 20, 1974." (Emphasis supplied.) According to Black's Law Dictionary 1411 (5th ed. 1979), the word "void" means: "Null; ineffectual; nugatory; having no legal force or binding effect; unable, in law, to support the purpose for which it was intended." "Voidable," on the other hand, means: "That which may be avoided, or declared void; not absolutely void, or void in itself. That which operates to accomplish the thing sought to be accomplished, until the fatal vice in the transaction has been judicially ascertained and declared.

Slaughter v. Qualls, 139 Tex. 340, 162 S.W.2d 671, 674. It imports a valid act which may be avoided rather than an invalid act which may be confirmed. Paulson v. McMillan, 8 Wash.2d 295, 111 P.2d 983, 985." *Id.* at 1411. As further noted in Black's at 1411: "There is this difference between the two words 'void' and 'voidable': *void* in the strict sense means that an instrument or transaction is nugatory and ineffectual so that nothing can cure it; *voidable* exists when an imperfection or defect can be cured by the act or confirmation of him who could take advantage of it." (Emphasis in original.)

The specific provisions of § 79-1108 must of necessity be considered to be "voidable" and not "void." That which is void could not become valid by the passage of time. Yet, here, we have a statute which provides that even if property is transferred from an accredited school district to a nonaccredited school district, it may be valid if no action is brought within 4 years from the date of the transfer. That clearly describes a voidable transaction rather than a void transaction. While it is true that in the case at bar the action was brought within the 4 years, it is likewise clear that all the steps necessary to satisfy accreditation had been met prior to the date of transfer on March 2, 1979, and, in fact, had been formally acknowledged prior to the time the children commenced school in August of 1979 and well in advance of the time that the District Court was called upon to enter judgment. Appellants conceded at the time of argument to this court that if this court were to hold that the transfer was ineffectual because the district was not formally accredited on March 2, 1979, the most that could be accomplished would be a delay of 1 year in waiving the tuition paid by the Millers to the Filley District. That is to say, if we were to hold that the transfer was invalid for the year 1979-80 as contended by the Lewiston District, the Millers would simply pay tuition to the Filley District for

their children, file another action to transfer their land, and succeed insofar as the question of the accreditation of the Filley District was concerned. Such a situation must of necessity be of the type contemplated by the courts in developing the equitable principles heretofore announced. It would serve virtually no purpose, other than to impose upon the Millers the payment of tuition to the Filley District, for us to strictly enforce the provisions of § 79-1108 because the formal document was not issued until several days after the transfer became effective. We believe that a more practical and reasonable interpretation must be to the effect that where, as here, all the acts necessary to effect accreditation of a school district have been met prior to the statutory board ordering the transfer and, in fact, the formal certification is granted prior to the time the children begin school and prior to the time the District Court acts on the appeal, the issue of the accreditation of the new district must be considered to have become moot and the transfer deemed to be permitted on the question of accreditation.

Having so disposed of that matter, we then turn to the second issue raised by appellants. Appellants maintain that the Millers have failed to sustain their burden of proof in establishing that it is in the best "educative" interests of their children to permit such transfer. While the statute in question, § 79-403, uses the phrase, "the best interest of the petitioner or petitioners," we have heretofore interpreted that to mean the "best educative interest of petitioner or petitioner or petitioners." See *Friesen v. Clark*, 192 Neb. 227, 229, 220 N.W.2d 12, 14 (1974). Our inquiry, therefore, is whether there is sufficient evidence from which we may reasonably conclude that the transfer in this case is indeed in the best educative interests of the petitioners. As we observed in *Klecan v. Schmal*, 196 Neb. 100, 241 N.W.2d 529 (1976), the distinctions

in these cases are rarely, if ever, wide and clear and may not be fully examined and understood except by reviewing the totality of the matter.

Likewise, in the *Klecan* case we noted that while the statute prescribes certain elements which "must" be shown to be of significant difference, the word "must" used in this statute indeed means "may." We said in *Klecan, supra* at 104-05, 241 N.W.2d at 532: "We do not agree with objectors' contention; nor do we believe it is necessary that the court, in making its final determination, afford equal weight and significance to each of the listed items. Significantly, the court also stated that other factors may properly be considered in ruling on such a petition, but are not *alone* enough to justify a transfer of land under that statute." (Emphasis in original.)

Our examination of the record satisfies us that there is a sufficient educative difference to justify the transfer. The relatively short distance between the Millers' home and the Filley District enables the Millers to more easily participate in their children's school activities, certainly in the best educative interests of the children. Likewise, the teacher-student ratio in the Filley District is lower, thereby enabling its teachers to provide a greater amount of individual attention to each student and facilitating the teacher's ability to evaluate and administer each child's education.

The fact that the Filley principal is able to devote the greatest portion of his time to the administration of the school is likewise of some significance. Such attention ensures that the administrative needs of the school and the students are the prime concern of the principal and not merely incidental to other duties. Such concern should provide greater supervision of the teachers, which in turn should provide better educational benefits to the student.

We are further impressed by the fact that the Filley kindergarten program is conducted for one-half day

during the entire school year while the Lewiston kindergarten program is conducted on a full-day basis during just the spring semester. In this particular case, the evidence discloses that the Filley District's kindergarten program is more conducive to the attention span of children of kindergarten age, all in the best educative interests of the student.

Likewise, while not in itself controlling, the fact does remain that Nichole was already enrolled at Filley and had made associations in the Filley District. Having both children in the same school is a factor to be considered by both the statutory board in the first instance and the court on review. Should the transfer be denied, it is possible Nichole would have to leave the Filley District and return to the Lewiston District. Social and school adjustments made by Nichole during attendance in the Filley District should not be disregarded. As we indicated at the outset, no one factor standing alone may be sufficient to establish "best educative interests of petitioners." The "best educative interests" of the children can only be determined by taking all the relevant factors into account and viewing them as a whole. When all the factors involved in this case are considered as a whole, we are compelled to reach the conclusion that indeed the best educative interests of the children would be served by permitting them to attend the Filley District. That being the case, we believe the trial court correctly concluded that the transfer of the Miller land from the Lewiston District to the Filley District was in the best educative interests of the children. The second assignment of error raised by appellants must also, therefore, be rejected.

For the foregoing reasons, then, we affirm the judgment of the District Court.

AFFIRMED.

ERNEST MEYER, APPELLANT, V. BOARD OF EDUCATION, SCHOOL DISTRICT NO. 68, ET AL., APPELLEES.

303 N.W.2d 291

Filed March 13, 1981. No. 43303.

Schools and School Districts: Contracts: Tenure. Probationary teachers in Class I, II, III, and VI schools are not entitled to notice of conditions constituting just cause for termination because their contracts are not continuing and no cause need be shown to terminate them.

Appeal from the District Court for Thayer County: ORVILLE L. COADY, Judge. Affirmed.

Koenig & Murray for appellant.

Timothy S. Schmidt for appellees.

Theodore L. Kessner and Mark D. McGuire of Crosby, Guenzel, Davis, Kessner & Kuester for Nebraska State Education Assn. as amicus curiae.

Heard before KRIVOSHA, C.J., BOSLAUGH, MCCOWN, CLINTON, BRODKEY, WHITE, and HASTINGS, JJ.

WHITE, J.

Appellant, Ernest Meyer, was employed as a probationary teacher for the school year 1978-79 by the appellee School District No. 68, Thayer County, Nebraska. On April 27, 1979, the Board of Education, by unanimous vote, agreed not to offer a contract to the appellant for the 1979-80 school year. Appellant was notified of this action by the school board on April 30, 1979. Meyer filed a petition in the District Court for Thayer County alleging various procedural errors and requested that the action of the school board be declared ineffective in determining not to offer him a contract for the 1979-80 school year. The District Court affirmed the action of the school board. Meyer appeals. We affirm.

This is one of a series of cases that have been decided under Neb. Rev. Stat. § 79-1254 as it has been amended

over the years. In 1971, § 79-1254, as amended, provided that all administrators and teachers holding a certificate valid for more than 1 year were entitled to a continuing contract not to be terminated without a majority vote of the board, timely notice, and a hearing if requested. The bases for the board's vote to terminate under this section were "unsatisfactory performance or other conditions because of a reduction in staff members or change of leave of absence policies of the board of education which the board considers *may be cause* to either terminate . . . ." (Emphasis supplied.)

In 1975, in response to *Schultz v. School Dist. of Dorchester*, 192 Neb. 492, 222 N.W.2d 578 (1974), § 79-1254 was again amended. In *Schultz*, this court held that under the 1971 version of § 79-1254, school boards could terminate any teacher for "any cause whatsoever, or for no cause at all." *Id.* at 500, 222 N.W.2d at 583. The 1975 Legislature repealed the existing sections of § 79-1254 and enacted the following: "The original contract of employment with an administrator or a teacher and a board of education of a Class I, II, III, or VI district shall require the sanction of a majority of the members of the board. ~~Any~~ Except for the first two years of employment under any contract entered into after the effective date of this act, any contract of employment between an administrator or a teacher who holds a certificate which is valid for a term of more than one year and a Class I, II, III, or VI district shall be deemed renewed and shall remain in full force and effect until a majority of the members of the board vote on or before May 15 to amend or to terminate the contract for just cause at the close of the contract period. The first two years of the contract shall be a probationary period during which it may be terminated without just cause. Any superintendent or associate superintendent may have his contract of employment terminated without just cause at the close of the contract period. ; ~~Provided, that the~~ The secretary of the board shall, not later than April 15, notify each admin-

istrator or teacher in writing of any conditions of unsatisfactory performance or other conditions because of a reduction in staff members or change of leave of absence policies of the board of education which the board considers may be just cause to either terminate or amend the contract for the ensuing school year. Any teacher or administrator so notified shall have the right to file within five days of receipt of such notice a written request with the board of education for a hearing before the board. Upon receipt of such request the board shall order the hearing to be held within ten days, and shall give written notice of the time and place of the hearing to the teacher or administrator. At the hearing evidence shall be presented in support of the reasons given for considering termination or amendment of the contract, and the teacher or administrator shall be permitted to produce evidence relating thereto. The board shall render the decision to amend or terminate a contract based on the evidence produced at the hearing."

In *Wang v. Board of Education*, 199 Neb. 564, 566, 260 N.W.2d 475, 477 (1977), the majority observed that: "[1975 Neb. Laws, L.B. 82] (1) required and defined just cause for dismissal; (2) separated the statutory provisions applicable to teachers and superintendents; and (3) created a 2-year probationary period during which newly hired teachers could be dismissed without a showing of just cause."

Originally the bill proposed to affect the same class of people affected by § 79-1254 (Reissue 1971), all teachers and administrators with a valid certificate for more than 1 year. Opposition to the bill, however, argued that making the just cause requirement applicable to all teachers would essentially create a system of automatic tenure in teachers and take from the school boards the opportunity to view teachers on a probationary basis. See, Senator Lewis, Floor Debate at 385, January 31, 1975. An amendment to the bill removed from the just cause provisions teachers in their first 2 years of employment with the district. Dworak-Mills Amend-

ment, Legislative Journal (1975) at 456.

Appellant argues, however, that probationary teachers are still entitled to notice and a hearing if requested. This contention is without merit. Probationary teachers are exempted from every provision outlined in § 79-1254 (Reissue 1976): "Except for the first two years of employment . . . any contract of employment . . . shall be deemed renewed and shall remain in full force . . . ." and "[t]he first two years of the contract shall be a probationary period during which it may be terminated without just cause." Although § 79-1254 is somewhat confusingly arranged, the following interpretation is the one supported by both the rules of sentence construction and legislative intent.

The statute requires that permanent teachers' contracts continue from year to year except until just cause is shown for termination. Probationary teachers' contracts do not continue and they may be terminated for any reason or no reason. Notice of conditions constituting just cause for termination must be served on teachers prior to termination; probationary teachers are excluded from this requirement because their contracts are not continuing and no cause need be shown to terminate them.

"A fundamental principal of statutory construction is to ascertain the legislative intent and give effect to it, if it is a lawful one." *Schultz v. School Dist. of Dorchester*, 192 Neb. 492, 496, 222 N.W.2d 578, 581 (1974). The intent of the Legislature in amending the bill to exempt probationary teachers from the notice and hearing requirements is expressed in the senators' comments relating to the tenure system in District IV (Lincoln) and District V (Omaha). "It is not that major a change and it only does for these Class districts what the Omaha and Lincoln school districts and their employees seem to be well satisfied with, and it seems completely reasonable." Senator Dickinson, Floor Debate, January 31, 1975, at 387. Speaking to the

need for the amendment, Senator Clark stated at 386: "I would assume that anyone having tenure in Class IV or V schools doesn't automatically have tenure. I think there's probably a probationary period." Compare § 79-1254 with Neb. Rev. Stat. §§ 79-1256 and 79-1259 (Reissue 1976).

Neb. Rev. Stat. § 79-1254 (Reissue 1971) was amended by 1975 Neb. Laws, L.B. 82, and the original sections were repealed. Legislative Journal (1975) at 599. As set out above, probationary teachers were excluded from the protection established by L.B. 82 and they are not included in the class of teachers entitled to notice, a hearing, and just cause shown for termination of their contracts. The judgment of the District Court is affirmed.

AFFIRMED.

ALBERT G. TIBBS, DOING BUSINESS AS TIBBS CONSTRUCTION COMPANY, APPELLANT, V. STAN FISHER, DOING BUSINESS AS FISHER LAND COMPANY, LTD., APPELLEE.

303 N.W.2d 293

Filed March 13, 1981. No. 43313.

1. **Judgments: Appeal and Error.** The judgment of the trial court in a law action where a jury has been waived has the effect of a verdict of a jury and will not be set aside on appeal unless clearly wrong.
2. **Appeal and Error: Evidence.** It is not the province of this court in reviewing the record in an action at law to resolve conflicts in or weigh the evidence.
3. ____: ____. In determining the sufficiency of the evidence to sustain a judgment in a law action, it must be considered most favorably to the successful party, every controverted fact must be resolved in that party's favor, and he must have the benefit of any inferences reasonably deducible from it.
4. **Contracts.** Generally, a party who has failed or refused to perform the terms and conditions imposed upon him by a contract, or has not been ready, willing, and able to perform the same, cannot recover for a breach thereof by the other party.

5. ——. There is implied in every contract for work or services a duty to perform it skillfully, carefully, diligently, and in a workmanlike manner.
6. ——. Substantial performance is shown in a building contract when all of the essentials necessary to the full accomplishment of the purposes for which the thing contracted for has been constructed and performed with such an approximation to complete performance that the owner obtains substantially what is called for by the contract.
7. **Libel and Slander.** Notice consisting solely of a statement of the termination of a prior business or professional relationship is not by itself libelous or slanderous.

Appeal from the District Court for Douglas County: JERRY M. GITNICK, Judge. Affirmed.

Ivory Griggs and Wilbur C. Smith of Smith & Hansen for appellant.

H. Daniel Smith of Daub, Stehlik & Smith for appellee.

Heard before BOSLAUGH and WHITE, JJ., and RONIN, BARTU, and KELLY, District Judges.

KELLY, District Judge.

Defendant-appellee was in the business of buying and renovating apartment buildings and had five adjacent apartment buildings in North Omaha that were in very poor condition and had been vandalized. Appellee looked for and found contractors and sought bids for the renovation of these buildings. The appellee employed the plaintiff-appellant, by contract, to renovate these buildings; no plans were submitted and no architect was employed.

The appellant began work on the project on July 20, 1978, and continued until September 16, 1978, when the appellee ordered appellant off the job because of problems with workmanship and diligence in completing the work.

It is well recognized that, as a general rule, every contract for work or services includes an implied duty to perform the work or services skillfully, carefully, diligently, and in a workmanlike manner. See 17 Am. Jur. 2d *Contracts* § 371 (1964). The record discloses

many areas of unacceptable workmanship and delays due to poor quality work. We will not recite all of the examples here. Suffice it to say that it appears from the record that the termination of the contract by the appellee was justified by the breach of contract by the appellant. Generally, a party who has failed or refused to perform the terms and conditions imposed upon him by a contract, or has not been ready, willing, and able to perform the same, cannot recover for a breach thereof by the other party. *Bodtke v. Bratten*, 166 Neb. 36, 88 N.W.2d 159 (1958).

Substantial performance is shown in a building contract when all of the essentials necessary to the full accomplishment of the purposes for which the thing contracted for has been constructed and performed with such an approximation to complete performance that the owner obtains substantially what is called for by the contract. *Jones v. Elliott*, 172 Neb. 96, 108 N.W.2d 742 (1961). The record in this case discloses that the appellant failed to substantially perform his contract inasmuch as the work contracted for was not performed in a workmanlike manner. In cases of this sort, the builder must be understood to have agreed to use the diligence and attention and skill adequate to the completion of his bargained-for performance. See 17 Am. Jur. 2d *Contracts* § 371 (1964). See, also, *Credit Bureau Services, Inc. v. Moylan*, 195 Neb. 197, 237 N.W.2d 151 (1976). The evidence shows that the appellant failed to perform his contract, with reference to supervision and workmanlike production.

In addition to his contract claim, the appellant's second cause of action asserted that his business reputation had been slandered by virtue of letters the appellee sent to the appellant's building materials suppliers. The gist of the letter was that the appellee had terminated his relationship with the appellant and that no more materials should be charged against the appellee's property. The appellant's slander claim must, likewise, fail. The general rule in this regard is: "The publication

of a notice consisting solely of a statement of the cessation of a prior business or professional relationship between the parties is generally held not to be libelous or slanderous." 50 Am. Jur. 2d *Libel and Slander* § 117 at 617 (1970). The appellee's letter was a straightforward notification to suppliers who were his potential creditors that the appellee would not honor any further charges for materials for the project involved in this case. As such, the letter was not actionable.

This case was tried to the court below without a jury. The judgment of the trial court in a law action where a jury has been waived has the effect of a verdict of a jury and will not be set aside unless clearly wrong. It is not the province of this court in reviewing the record in an action at law to resolve conflicts in or weigh the evidence. Furthermore, in determining the sufficiency of the evidence to sustain a judgment in a law action, it must be considered most favorably to the successful party, every controverted fact must be resolved in that party's favor, and he must have the benefit of any inferences reasonably deducible from it. *H. D. Fager Oil Co., Inc. v. Vanice*, 192 Neb. 789, 224 N.W.2d 372 (1974). When viewed under the standards just enunciated, there can be no doubt that the judgment of the trial court was correct on both the facts and the law, and must be affirmed.

AFFIRMED.

BARTU, District Judge, concurs in result.

CELESTE JEAN PICKETT, APPELLEE, V. VINCENT K. PARKS, APPELLANT.

303 N.W.2d 296

Filed March 13, 1981. No. 43321.

1. **Motor Vehicles: Highways.** A motorist approaching a highway protected by stop signs must stop before going upon the highway, must look to his left and to his right, and must permit a motor vehicle which is proceeding along the highway protected by stop signs to pass if it is at a distance and is traveling at a speed making it imprudent for the motorist to proceed into the intersection.
2. ____: ____. The duty of a motorist to look for vehicles approaching on a highway protected by stop signs implies the obligation to see what is in plain view.
3. ____:____. A motorist entering an intersection of highways is obligated to look for approaching automobiles and to see any vehicle within that radius which denotes the limit of danger.
4. **Motor Vehicles: Negligence.** If a motorist entering an intersection looks for approaching vehicles but fails to see one which is favored over him under the rules of the road, he is guilty of negligence as a matter of law.
5. **Highways.** A traveler on highways may assume, unless and until he has warning, notice, or knowledge to the contrary, that any other user of the highways will use them in a lawful manner, and until he has such warning, notice, or knowledge, he may govern his acts in accordance with such assumption.

Appeal from the District Court for Douglas County: JOHN T. GRANT, Judge. Affirmed.

Walsh, Walentine, Miles, Fullenkamp & O'Toole for appellant.

Thomas R. Wolff for appellee.

Heard before BOSLAUGH and WHITE, JJ., and RONIN, KELLY, and BARTU, District Judges.

KELLY, District Judge.

This is an appeal from the District Court for Douglas County and involves an automobile accident that occurred at the intersection of Lafayette Avenue and 69th Street in Omaha, Nebraska. Trial was to a jury; and at the close of appellant's evidence, the trial court directed a verdict in favor of appellee on the negligence and contributory negligence issues.

The appellant was traveling west on Lafayette Avenue. This street has a stop sign protecting 69th Street; the appellee was proceeding north on 69th Street. Sixty-ninth Street is a two-lane street, one lane north and one south.

The appellant claims he came to a complete stop and then looked both to the right and the left before proceeding into the intersection where the appellee struck the left side of his automobile at the rear door. A disinterested eyewitness testified that appellee was 20 feet from the intersection when the appellant came through without stopping at the stop sign, and the appellee was going about 20 miles per hour.

This case is governed by several oft-stated rules of law. A motorist approaching a roadway protected by stop signs must stop before going upon the highway, must look to his left and to his right, and must permit a motor vehicle which is proceeding along the roadway protected by stop signs to pass if it is at a distance and is traveling at a speed making it imprudent for the motorist to proceed into the intersection. *Hartman v. Brady*, 201 Neb. 558, 270 N.W.2d 909 (1978); *Nistor v. Therkildsen*, 181 Neb. 817, 151 N.W.2d 443 (1967). Furthermore, the duty of a motorist to look for vehicles approaching on a roadway protected by stop signs implies the obligation to see what is in plain view. *Nistor v. Therkildsen, supra; Nichols v. McArdle*, 170 Neb. 382, 102 N.W.2d 848 (1960). Similarly, a motorist entering an intersection of highways is obligated to look for approaching automobiles and to see any vehicle within that radius which denotes the limit of danger. *Nistor v. Therkildsen, supra; Nichols v. McArdle, supra.* Finally, a motorist who is entering an intersection and looks for approaching vehicles but fails to see one which is favored over him under the rules of the road is guilty of negligence as a matter of law. *Nistor v. Therkildsen, supra; Nichols v. McArdle, supra; Cappel v. Riener*, 167 Neb. 375, 93 N.W.2d 36 (1958).

Since this case comes to us after a directed verdict for

the appellee, the evidence must be considered in the light most favorable to the appellant. Every controverted fact must be resolved in favor of the appellant and he is entitled to the benefit of every reasonable inference that may be drawn from the evidence. *Treffer v. Seevers*, 195 Neb. 114, 237 N.W.2d 114 (1975); *Melia v. Svoboda*, 191 Neb. 150, 214 N.W.2d 476 (1974). Be that as it may, the principles of law cited above applied to the facts taken most favorably to the appellant result in the conclusion that the appellant was guilty of negligence as a matter of law.

The burden to establish contributory negligence is on the defendant. *Nistor v. Therkildsen, supra; Coltan v. Benes*, 176 Neb. 483, 126 N.W.2d 652 (1964); *Hancock v. Paccar, Inc.*, 204 Neb. 468, 283 N.W.2d 25 (1979). The damage to both vehicles involved in this case was minimal, and that fact, in itself, rules out the possibility of excess speed on behalf of the appellee. In addition, the appellee is entitled to the benefit of the rule that a traveler on the highways may assume, unless and until he has warning, notice, or knowledge to the contrary, that any other user of the highways will use them in a lawful manner, and until he has such warning, notice, or knowledge, he may govern his acts in accordance with such assumption. *Nistor v. Therkildsen, supra; Nichols v. McArdle, supra; Paddack v. Patrick*, 163 Neb. 355, 79 N.W.2d 701 (1956). In this case, the evidence shows that it was too late to avoid the accident after the appellant's sudden or unexpected entry into the intersection.

The trial court was correct in directing the verdict on the negligence and contributory negligence issues and its judgment is affirmed.

AFFIRMED.

BARTU, District Judge, concurs in result.

STATE OF NEBRASKA, APPELLEE, V.
RALPH E. ANDERSEN, APPELLANT.

303 N.W.2d 298

Filed March 13, 1981. No. 43396.

Appeal from the District Court for Douglas County: JAMES M. MURPHY, Judge. Affirmed.

William M. Berlowitz of Friedman Law Offices for appellant.

Paul L. Douglas, Attorney General, and Judy K. Hoffman for appellee.

Heard before KRIVOSHA, C.J., BOSLAUGH, MCCOWN, CLINTON, BRODKEY, WHITE, and HASTINGS, JJ.

MCCOWN, J.

The defendant pleaded guilty to a charge of theft by receiving stolen property of a value of over $1,000. The District Court, after a presentence investigation, sentenced the defendant to 3 to 5 years' imprisonment.

On November 29, 1979, the defendant was charged with theft by receiving stolen property over $1,000 in value. Two other similar charges were pending against the defendant, one in the District Court and one in the county court of Douglas County. On February 5, 1980, pursuant to a plea bargain, the other two charges were dismissed and the defendant pleaded guilty to the charge involved in this case. A presentence investigation was ordered and on March 13, 1980, the defendant appeared before the District Court for sentencing. Meanwhile, on March 5, 1980, the defendant was arrested and charged in the county court of Sarpy County with the offense of theft by deception.

The presentence investigation report in the present case had been completed before the March 5 charge. The record shows that defendant's counsel submitted the March 5 police record and reports to the court prior to the sentencing hearing and they were made a part of

the presentence report in this case. The record also establishes that at the sentencing hearing defendant's counsel commented on the police reports and summarized his conclusions as to the facts reflected in the reports. He also stated that the defendant had cooperated with the police by showing them where various items of stolen merchandise were located. Counsel also argued that defendant's family had been threatened because of that cooperation.

The District Court stated that it was not basing its sentence in the present case on the Sarpy County charge, but expressed its belief that the defendant was extensively involved in the business of dealing in stolen property and pronounced the sentence of 3 to 5 years' imprisonment and gave the defendant credit for 1 week in custody prior to sentencing.

The defendant now contends on appeal that the court took into consideration, in sentencing, information or reports which were not made available to the defendant to which the defendant had no opportunity to respond, and, therefore, defendant was denied due process of law. He also contends the sentence was excessive. The record demolishes defendant's contentions.

A sentencing judge has broad discretion as to the source and type of evidence or information which may be used in determining the kind and extent of the punishment to be imposed, and the judge may consider probation reports, police reports, affidavits, and other information, including his own personal observations. See *State v. Kramer*, 203 Neb. 658, 279 N.W.2d 634 (1979).

The defendant's prior criminal record was extensive. The sentence of 3 to 5 years was well within the statutory limits of 1 to 20 years and was not excessive. The conviction and sentence are affirmed.

AFFIRMED.

SELDIN DEVELOPMENT & MANAGEMENT COMPANY, A CORPORATION, APPELLANT, V. GERALD E. CHIZEK, COMMISSIONER OF LABOR, STATE OF NEBRASKA, ET AL., APPELLEES.

303 N.W.2d 300

Filed March 13, 1981. No. 43562.

1. **Employment Security Law: Words and Phrases.** The exemption from the term "employment" in Neb. Rev. Stat. § 48-604(6)(o) (Reissue 1978) includes participation in a voluntary work-study program as long as grades and credits received are applied toward the high school degree and it is a part of an approved course of study.
2. **Employment Security Law.** When a school has certified to an employer that work-study is an integral part of its educational program, the employer should be allowed to rely on that assurance, particularly when such conclusion is adequately supported by the record.

Appeal from the District Court for Douglas County: ROBERT V. BURKHARD, Judge. Reversed.

C. Robert Vote and Malcolm D. Young of Young & White for appellant.

Pamela A. Mattson for appellee Chizek.

William E. Pfeiffer of Spielhagen, Pfeiffer & Miller, Associates, for appellee Benson.

Heard before KRIVOSHA, C.J., BOSLAUGH, MCCOWN, CLINTON, BRODKEY, WHITE, and HASTINGS, JJ.

HASTINGS, J.

Seldin Development & Management Company (Seldin) appealed from an order of the District Court affirming an award of unemployment compensation benefits to Steve Benson, a high school student. Seldin assigns as error the finding that Steve's job was not an integral part of his academic training which would exempt his services from unemployment benefits according to Neb. Rev. Stat. § 48-604(6)(o) (Reissue 1978). Further assigned as error is the court's failure to treat Steve's admission in his answer of portions of Seldin's petition as a judicial admission and waiver of

controversy against himself and the codefendant, the Commissioner of Labor. For the reasons to follow, we reverse the order of the District Court.

Generally speaking, unemployed individuals are entitled to benefits under the Nebraska Employment Security Law, Neb. Rev. Stat. §§ 48-601 et seq. (Reissue 1978). However, two exceptions must be noted for the purpose of this appeal. Section 48-604 provides in part as follows: "(6) The term employment shall not include: . . . (o) service performed by an individual under the age of twenty-two who is enrolled at a nonprofit or public educational institution which normally maintains a regular faculty and curriculum and normally has a regularly organized body of students in attendance at the place where its educational activities are carried on, as a student in a full-time program, taken for credit at such institution, which combines academic instruction with work experience, if such service is an integral part of such program, and such institution has so certified to the employer . . . ." Neb. Rev. Stat. § 48-627 (Reissue 1978) provides in part that "[a]n unemployed individual shall be eligible to receive benefits with respect to any week, only if the Commissioner of Labor finds: . . . (e) For any benefit year, he has, within his base period, been paid a total sum of wages for employment by employers equal to not less than six hundred dollars, of which sum at least two hundred dollars shall have been paid in each of two quarters in his base period."

There is no dispute as to the underlying facts. Steve was a 17-year-old junior at Millard High School, enrolled in the special education program. He voluntarily took part in the supervised occupational skills program, the purpose of which was to give students an opportunity to learn how to interview for jobs and work in the community. Students were taught proper work habits and the importance of getting to work on time, as well as how to deal with employers. The program consists of a formal one-semester class in which all of

the classwork pertains to actual work experience or job-related experiences. Students take tests and receive grades. The second part of the program is voluntary and requires the student to go out and work in the community. The employer must be certified by the school, an interview is arranged for the student, and the instructors work closely with the student's employer when problems arise on the job. The students are graded on their work and receive credits toward graduation.

As part of this program Steve was employed by Seldin to do general maintenance work at an apartment complex. Steve worked for Seldin for two semesters of his junior year, commencing in September of 1977. After the end of the second semester on June 2, 1978, Steve stayed on as an employee for the summer; however, his employment was terminated 6 days after school was dismissed for the semester.

Steve sought unemployment compensation benefits after he was terminated, and requested that he be credited as having worked for a period including the previous two semesters as well as for the 6 days after school was dismissed. The Commissioner of Labor allowed the claim. Seldin filed an appeal from the allowance of that claim to the Nebraska Appeal Tribunal, which affirmed the Commissioner's decision. Seldin then filed a petition for review in the District Court for Douglas County, which denied the appeal.

Seldin assigns as error the determination that Steve's job was not an integral part of his academic training. Seldin asserts that the two semesters of employment that involved the work-study were exempted by § 48-604(6)(o).

It is apparent, and the parties agree, that if the two semesters of employment fall within the exception provided for by § 48-604(6)(o) Steve would not be entitled to benefits for the 6 days of covered employment because he would not have been paid total wages of $600 for that benefit year, as required by § 48-627(e).

It would seem that the exclusion of § 48-604(6)(o) is intended to encourage employers to participate in cooperative educational plans. The view is that schools might have more success in persuading employers to participate if the wages paid to the students were not taxable. [1977] 1B Unempl. Ins. Rep. (CCH) ¶ 1362.

The Commissioner of Labor argues that the work done by Steve was not an integral part of his academic program because Steve was not required to work outside of the school to complete requirements for the special education program or to fulfill requirements for graduation from high school. The Commissioner further argues that the job of maintenance man was not combined with academic instruction, and there was no showing that Steve could gain anything from a manual labor job.

We first note that the program in which Steve was involved was a Level II special education program. To qualify for this program, a student must be verified as learning disabled, emotionally disturbed, or educably mentally handicapped. Steve had a learning disability. In Level II are those students who primarily cannot get along in the regular mainstream class. The occupational skills program is not intended to teach a student a skill such as woodworking or carpentry; rather, it is intended to teach students how to interview for a job and how to work in the community, as previously set forth. Students are not allowed to receive credit for an outside job unless they have first taken the classroom semester, and the employer has been certified by the school.

We agree with Seldin that the program in which Steve was involved was a full-time program, taken for credit at Millard High School; was combined with academic instruction; is an integral part of the program, and the school so certified the above to the employer. Merely because the actual work done by Steve was manual labor does not mean that he cannot learn a valuable lesson from it, particularly since the pur-

pose of the program is to teach Level II students how to participate in the working community and not necessarily how to be a maintenance person. Neither are we convinced by the argument that a voluntary program cannot come within the meaning of "integral part of the program." To come within the statute, work-study need not be required for graduation, as long as the students receive grades and credits that are applied toward their high school degree, and it is a part of an approved course of study, as it was in this case.

Seldin was recruited by Millard High School to participate in the program and was assured that instructors would work closely with the employer in helping the student have a successful work experience. The school had certified to the employer that such work was an integral part of its educational program and the employer should be allowed to rely on that assurance, particularly when, as here, such conclusion was adequately supported by the record.

The fundamental principle of statutory construction is to ascertain the legislative intent and to give it effect. The reasons for the enactment and the purposes and objects of an act may be guides in an attempt to give effect to the main intent of the lawmakers. The court must look to the object to be accomplished or the purpose to be subserved and place such construction on the statute that will best effect that purpose, rather than one that will defeat it. *School District of Murray v. Lancaster*, 203 Neb. 109, 277 N.W.2d 558 (1979). We believe that our determination made here, de novo on the record, that Steve's job was an integral part of his educational program and therefore comes within the statutory exception, is consistent with that principle of statutory construction.

Having made that determination, we need not consider appellant's second assignment of error. The judgment of the District Court is reversed, and the claim of the appellee, Steve Benson, is ordered dismissed.

REVERSED.

STATE OF NEBRASKA, APPELLEE, V. JOHN EDWARD RUST, ALSO KNOWN AS JOHN DEWITT, APPELLANT.

303 N.W.2d 490

Filed March 20, 1981. No. 43019.

1. **Post Conviction: Motion to Vacate.** A motion to vacate a judgment and sentence under the Post Conviction Act cannot be used as a substitute for an appeal or to secure a further review of issues already litigated.
2. **Criminal Law: Statutes.** The amendment of a statute under which an accused was convicted does not affect the legitimacy of his conviction or the propriety of his sentence.
3. **Criminal Law: Effectiveness of Counsel.** Our standard for determining whether or not counsel for a criminal defendant has provided adequate representation is that trial counsel perform at least as well as a lawyer with ordinary training and skill in the criminal law in his area, and that he conscientiously protect the interests of his client.
4. **Post Conviction: Proof: Appeal and Error.** The defendant has the burden of establishing a basis for relief in a post conviction proceeding and the findings of the District Court in denying such relief will not be disturbed on appeal unless they are clearly erroneous.
5. **Criminal Law: Effectiveness of Counsel.** The determination of sufficiency of counsel must be made within the context of the facts of a particular case, and we will not require defense counsel to develop ridiculous trial tactics because they are suggested by the defendant.
6. **Criminal Law: Aggravating and Mitigating Circumstances.** In order for something to be considered a mitigating factor it must be probative of any aspect of the defendant's character or record or any of the circumstances of the offense that could be proffered as a basis for a sentence less than death.
7. **Criminal Law: Appeal and Error.** It is not the province of this court to resolve conflicts in the evidence, pass on the credibility of witnesses, determine the plausibility of explanations, or weigh evidence. Such matters are for the trier of fact, and the verdict must be sustained if, taking the view most favorable to the State, there is sufficient evidence to support it.

Appeal from the District Court for Douglas County: SAMUEL P. CANIGLIA, Judge. Affirmed.

Paul E. Watts and Gerald E. Moran for appellant.

Paul L. Douglas, Attorney General, and J. Kirk Brown for appellee.

Heard before KRIVOSHA, C.J., BOSLAUGH, MCCOWN, CLINTON, BRODKEY, WHITE, and HASTINGS, JJ.

WHITE, J.

This case is now before this court appealing the denial of a motion for post conviction relief. On February 2, 1977, this court affirmed the jury verdict convicting the defendant, John E. Rust, of felony murder and the decision of a three-judge panel sentencing him to death for that murder. *State v. Rust*, 197 Neb. 528, 250 N.W.2d 867 (1977). Defendant cited as the basis for vacating and setting aside his conviction and sentence that he had had prejudicially ineffective assistance of trial counsel; that he was entitled to the benefits of Neb. Rev. Stat. § 29-2522 (Reissue 1979), as amended by 1978 Neb. Laws, L.B. 711, adopted subsequent to his sentencing; that the provisions of Nebraska's death penalty law violate the eighth and fourteenth amendments of the U.S. Constitution. The District Court denied defendant's motion and defendant appeals. We affirm the decision of the District Court.

Defendant assigns as error the following: (1) The finding of the trial court that the Nebraska death penalty law does not violate the eighth and fourteenth amendments prohibition against cruel and unusual punishment; (2) The finding that defendant was not denied effective assistance of trial counsel; (3) The District Court's failure to apply the provisions of L.B. 711; and (4) The District Court's failure to hold that Nebraska's death penalty is unconstitutional as applied to defendant.

"[A] motion to vacate a judgment and sentence under the Post Conviction Act cannot be used as a substitute for an appeal or to secure a further review of issues already litigated." *State v. Holtan*, 205 Neb. 314, 317, 287 N.W.2d 671, 674 (1980). In his direct appeal to this court, defendant raised the constitutional issues he now combines into assignment of error (4) and they will not be reconsidered.

Defendant argues under assignment of error (1) that his sentence is cruel and unusual punishment

in light of the confession of a codefendant, Ronald Ell, that Ell, not Rust, actually shot and killed the victim. This is apparently based on our discussion in *State v. Rust, supra* at 540-41, 250 N.W.2d at 875, regarding the propriety of sentencing one codefendant to life imprisonment and the other to death. In his direct appeal, defendant argued that his death sentence was arbitrary and discriminatory because Ell received a life sentence. We held that as a participant in the felony, Ell "was guilty of the murder of Kellogg only as an aider and abettor. He did not actually kill anyone. Although he was equally guilty with Rust in the robbery, his participation in the actual killing was relatively minor. See mitigating factor (e), § 29-2523, R.R.S. 1943." *State v. Rust, supra* at 541, 250 N.W.2d at 875.

Subsequent to Ell's sentencing, Ell appeared at defendant's post conviction relief hearing and testified that he had shot the victim. When defendant and Ell were arrested, the gun that was used to shoot the victim was found lying near the defendant. At defendant's post conviction relief hearing, Ell testified that during the shoot-out between the police and defendant and himself, Ell shot and killed the victim, then gave defendant his gun and took defendant's gun because defendant's gun had jammed. At no time during defendant's trial nor during Ell's trial did either defendant suggest this version of the crime to their attorneys or to the court. Ell's testimony was uncorroborated and the District Court judge at defendant's post conviction relief hearing found it unbelievable. A prison guard at the penal complex testified at the hearing that defendant admitted shooting the victim and the police officer again identified the defendant as the person who shot the victim. The record supports that finding. Defendant's contention in this regard is without merit.

Defendant's third assignment of error is likewise without merit. "L.B. 711, Laws 1978, was not enacted

until after the sentence in this case had been imposed and became final. Having become a final judgment prior to the effective date of L.B. 711, it is not affected by the adoption of L.B. 711. No capital case in which a final sentence was imposed prior to the effective date of L.B. 711, Laws 1978, is subject to the provisions of the act and will not be reviewed in light of the act." *State v. Holtan, supra* at 316, 287 N.W.2d at 673. The amendment of a statute under which an accused was convicted does not affect the legitimacy of his conviction or the propriety of his sentence. *United States v. Rojas-Colombo*, 462 F.2d 1091 (5th Cir. 1972), *cert. denied*, 410 U.S. 990, 93 S. Ct. 1507, 36 L. Ed. 2d 188.

In his second assignment of error, defendant argues his trial counsel was prejudicially ineffective. Specifically, defendant alleges that his trial attorney failed to make an opening statement; failed to impeach witnesses on inconsistencies; failed to take defendant to the scene of the shooting; failed to depose witnesses after the court ruled, permitting depositions to be taken; untimely filed his pretrial motions; failed to discuss trial strategy with defendant; failed to argue that the felony robbery had terminated before the shooting; failed to notify the court that defendant was dissatisfied with trial counsel; failed to move for a mistrial on voir dire of jurors; failure to review police reports; failed to prepare for trial; failure to renew motion to sever after opening statements; failed to move for a mistrial after evidence of defendant's use of an alias was introduced, after evidence that weapon used in the robbery was stolen was introduced; failed to determine whether an insanity defense existed; failed to poll the jury; failure to prepare his own motion for new trial; failed to attend the hearing regarding sentencing ground rules; failed to discuss sentencing strategy with defendant; failed to introduce mitigating factors at the sentencing hearing other than those enumerated in the statutes; failed to review

presentence investigation report; failed to inform sentencing court that State had discussed possibility of a plea bargain; failed to call to the court's attention that the prosecution had proven only two aggravating circumstances when, in its sentencing order, the court found there were four aggravating circumstances; failure to offer evidence in the form of a letter from a South Dakota state's attorney concerning codefendant Ell's violent tendencies; failed to point out to sentencing court that its fact interpretation of the shooting incident was incorrect; and failed to prepare and argue effectively at the sentencing hearing.

Our standard for determining whether or not counsel for a defendant in a criminal prosecution has provided adequate representation is "'that trial counsel perform at least as well as a lawyer with ordinary training and skill in the criminal law in his area, and that he conscientiously protect the interests of his client.'" *State v. Fowler*, 201 Neb. 647, 655, 271 N.W.2d 341, 347 (1978).

The burden of proof is on the defendant and he must establish by a preponderance of the evidence the incompetency of counsel. *State v. Auger & Uitts*, 200 Neb. 53, 262 N.W.2d 187 (1978). In his order denying defendant post conviction relief, the District Court judge found generally that defendant had not met his burden of proof and did not establish that he had been prejudiced by the action or inaction of his counsel.

Specifically, the District Court ruled that defendant's contentions concerning his counsel's failure to argue that the felony had ended, to make evidentiary objections, to properly cross-examine witnesses, and to present evidence that codefendant Ell, not defendant Rust, had killed the victim were without merit. The District Court likewise found that defendant, at the post conviction hearing, did not show the existence of mitigating factors in addition to those counsel raised at the sentencing hearing and that contention, therefore, was without merit. "The defendant has the burden

of establishing a basis for relief in a post conviction proceeding, and the findings of the District Court in denying such relief will not be disturbed on appeal unless they are clearly erroneous." *State v. Bishop, Davis, and Yates*, 207 Neb. 10, 19, 295 N.W.2d 698, 704 (1980). The record in this case supports the findings of the trial court.

The determination of sufficiency of counsel must, of course, be made within the context of the facts of a particular case. In this case defendant's trial counsel had the following to deal with: (1) The testimony of an eyewitness that defendant shot Kellogg; (2) The testimony of a police officer involved in the shoot-out that he had followed defendant from the time he left the parking lot of the store through the time the defendant was apprehended; and (3) The testimony of an officer who stated he was shot by the defendant and the fact that the gun that wounded that officer and killed Kellogg was found near defendant after he was shot and apprehended. Defendant's counsel testified that when he confronted defendant with these facts, defendant offered no practical suggestions concerning how they should proceed with his defense. Defendant's only contribution to his own defense was that his attorney offer to the court the story that defendant was shot at as he was walking past the area of the shoot-out and returned the fire.

Trial counsel for defendant testified at defendant's post conviction hearing. Concerning his failure to make certain evidentiary objections, cross-examine witnesses, and make an opening statement, he stated that his actions were the result of tactical decisions. "'[W]e grant due deference to the discretion of defense counsel to formulate trial tactics.'" *State v. Fowler*, *supra* at 656, 271 N.W.2d at 347.

We will not require defense counsel to develop ridiculous trial tactics such as defendant's counsel would have been required to do had he chosen to present defendant's tale that defendant was shot when he

inadvertently passed by the shoot-out. Furthermore, the record supports the District Court's finding that defendant demonstrated no prejudice due to any of his counsel's tactics.

The mitigating factor defendant brought to the court's attention was a letter sent by a South Dakota state's attorney to the chief of detectives of the Omaha Police Department. The letter expressed the attorney's opinion that Ell was a highly criminal and dangerous person. At the post conviction trial, the District Court judge stated that the evidence was not relevant and could not be considered a mitigating factor. We agree. Because the facts establish that Rust murdered the victim, the criminal nature of his codefendant is not probative of "any aspect of a defendant's character or record [or] any of the circumstances of the offense that [could be proffered] as a basis for a sentence less than death." *Lockett v. Ohio*, 438 U.S. 586, 604, 98 S. Ct. 2954, 57 L. Ed. 2d 973 (1978).

Finally, the District Court's determination that Ell's testimony was unbelievable is supported by the evidence and, as a result, defendant's related arguments concerning ineffective assistance of trial counsel are immaterial. "It is the general rule that it is not the province of this court to resolve conflicts in the evidence, pass on the credibility of witnesses, determine the plausibility of explanations, or weigh evidence. Such matters are for the trier of fact, and the verdict must be sustained if, taking the view most favorable to the State, there is sufficient evidence to support it." *State v. Fowler*, 201 Neb. 647, 658, 271 N.W.2d 341, 348 (1978).

For the reasons set out above, we find that the decision of the trial court denying defendant post conviction relief is supported by the evidence and is affirmed.

AFFIRMED.

KRIVOSHA, C.J., concurring in part, and in part dissenting.

I concur in the majority's opinion in this case in all respects save with regard to the majority's conclusion that the imposition of the death penalty in this case is constitutionally permissible. In that regard, I dissent.

Even if I disregard the provisions of 1978 Neb. Laws, L.B. 711, now Neb. Rev. Stat. §§ 29-2521.01 et seq. (Reissue 1979), adopted subsequent to the sentencing in this case, I must of necessity still conclude that the imposition of the death penalty in this case is in violation of the appellant's constitutional rights which existed prior to the adoption of L.B. 711.

A reading of the various opinions rendered in the case of *Furman v. Georgia*, 408 U.S. 238, 92 S. Ct. 2726, 33 L. Ed. 2d 346 (1972), makes it manifestly clear that the adoption of statutes such as Neb. Rev. Stat. § 29-2522 (Reissue 1979), and the provisions of L.B. 711, are simply a response to the U.S. Supreme Court's recognition that it is a violation of an individual's constitutional rights when the decision to execute is arrived at in an arbitrary and discriminatory manner. The fact that we may create criteria to aid us in imposing the death penalty does not overcome the constitutional prohibition if, after applying the formula, we nevertheless continue to impose the penalty in an arbitrary and capricious manner.

As noted by Mr. Justice Douglas in *Furman, supra* at 242: "The generality of a law inflicting capital punishment is one thing. What may be said of the validity of a law on the books and what may be done with the law in its application do, or may, lead to quite different conclusions.

"It would seem to be incontestable that the death penalty inflicted on one defendant is 'unusual' if it discriminates against him by reason of his race, religion, wealth, social position, or class, or if it is imposed under a procedure that gives room for the play of such prejudices."

And, further, in the same *Furman* decision we find the words of Mr. Justice Stewart, wherein he says at 390-91: "These death sentences are cruel and unusual in the same way that being struck by lightning is cruel and unusual. For, of all the people convicted of rapes and murders in 1967 and 1968, many just as reprehensible as these, the petitioners are among a capriciously selected random handful upon whom the sentence of death has in fact been imposed. My concurring Brothers have demonstrated that, if any basis can be discerned for the selection of these few to be sentenced to die, it is the constitutionally impermissible basis of race. [Citation omitted.] But racial discrimination has not been proved, and I put it to one side. I simply conclude that the Eighth and Fourteenth Amendments cannot tolerate the infliction of a sentence of death under legal systems that permit this unique penalty to be so wantonly and so freakishly imposed."

An examination of but a few cases within this jurisdiction makes it clear that the imposition of the death penalty in the instant case is, indeed, arbitrary and capricious.

In *State v. Scott*, 200 Neb. 265, 263 N.W.2d 659 (1978), the defendant was charged with murder in the perpetration of or in an attempt to perpetrate a robbery. The evidence disclosed that the defendant entered the home of William and Bertha McCormic in Omaha and demanded money at gunpoint. A scuffle ensued, Mr. McCormic was shot twice and killed, and Mrs. McCormic was shot twice and wounded. Mr. McCormic was 92 years of age at the time. Mrs. McCormic was 83, had impaired vision, and could not describe her assailant with any specificity. The defendant was sentenced to life imprisonment.

In *State v. Prim*, 201 Neb. 279, 267 N.W.2d 193 (1978), the defendant was charged with first degree murder, having shot and killed the defenseless operator of a gas station during the commission of a rob-

bery. He was sentenced to life imprisonment.

In *State v. Hatcher*, unappealed to this court, the defendant, being pursued by a police officer, engaged in a struggle with the police officer, and as the officer struggled with the defendant the officer's gun went off twice, the second time hitting the officer in the head. The defendant was sentenced to life imprisonment.

In *State v. Brown*, unappealed to this court, the defendant killed his victim during a robbery. He was sentenced to life imprisonment.

In *State v. Jimmie Ray Anderson*, unappealed to this court, a 34-year-old defendant and his wife resisted arrest by a patrolman, and in the struggle in the police car the patrolman was shot and killed. The defendant was sentenced to life imprisonment.

In *State v. Floyd*, unappealed to this court, the defendant, 37 years old, shot and killed an unarmed gas station attendant during the course of a robbery. He was sentenced to life imprisonment.

Each of those killings was senseless and unforgiving. Yet we, as courts, are required to be sure that the Constitution of both this state and the United States is always followed, regardless of other factors. Where the U.S. Supreme Court has declared that the arbitrary imposition of the death penalty violates the Constitution, we have no choice and may not approve the imposition of the death penalty when, as here, it appears to be arbitrarily imposed.

The words of Mr. Justice Marshall, joined by Mr. Justice Brennan, in *Godfrey v. Georgia*, 446 U.S. 420, 100 S. Ct. 1759, 64 L. Ed. 2d 398 (1980), appear each day to be more applicable. Marshall said in *Godfrey v. Georgia, supra* at 438-39: "I believe that the death penalty may not constitutionally be imposed even if it were possible to do so in an evenhanded manner. But events since *Gregg* make that possibility seem increasingly remote. Nearly every week of every year, this Court is presented with at least one peti-

tion for certiorari raising troubling issues of noncompliance with the strictures of *Gregg* and its progeny. On numerous occasions since *Gregg*, the Court has reversed decisions of State Supreme Courts upholding the imposition of capital punishment, frequently on the ground that the sentencing proceeding allowed undue discretion, causing dangers of arbitrariness in violation of *Gregg* and its companion cases. These developments, coupled with other persuasive evidence, strongly suggest that appellate courts are incapable of guaranteeing the kind of objectivity and evenhandedness that the Court contemplated and hoped for in *Gregg*."

I would affirm the action of the trial court in denying post conviction relief except with regard to the matter of the death penalty. In that regard, I would order the appellant be incarcerated for the balance of his natural life.

ROBERT K. BENSON ET AL., APPELLEES, V.
LESLIE RUGGLES ET AL., APPELLANTS.
CLARENCE D. BURTCH, APPELLANT, V.
ROBERT K. BENSON ET AL., APPELLEES.
LESLIE RUGGLES, APPELLANT, V.
ROBERT K. BENSON ET AL., APPELLEES.

303 N.W.2d 496

Filed March 20, 1981. Nos. 43053, 43054, 43055.

1. **Auctions: Statute of Frauds.** An auction of real estate without reserve is within the statute of frauds. Neb. Rev. Stat. § 36-105 (Reissue 1978).
2. **Estoppel.** In order to create an equitable estoppel, the party pleading it must have suffered a loss of a substantial character or been induced to alter his position for the worse in some material respect.

Appeal from the District Court for Frontier County: JACK H. HENDRIX, Judge. Affirmed.

Mousel & Burger, P.C., for appellants.

Carlton E. Clark for appellees.

Heard before KRIVOSHA, C.J., BOSLAUGH, MCCOWN, BRODKEY, WHITE, and HASTINGS, JJ., and MORAN, District Judge.

MORAN, District Judge.

This is an appeal from a decree quieting title to real estate, and denying specific performance of contracts for its sale alleged to have resulted from an auction without reserve. We affirm.

James Hinn (Hinn) and his wife, Judy, were the buyers of a ranch in Blaine, Logan, and Thomas counties, under an installment sale contract with Theodore and Robert Hanich, as sellers. The Hinns listed the ranch for sale with Stockmen's Realty, Inc., of North Platte (Stockmen's), a firm licensed to sell real estate in this state. Brokers or sales representatives for Stockmen's were Gary Coble and Al Cheatle. Robert K. Benson (Benson) learned that the ranch was for sale and contacted Cheatle. Benson and his wife, Dolores, (Bensons) owned two adjoining tracts of farm and pastureland in Frontier County. Negotiations progressed to the point that an exchange agreement was executed by the Hinns and the Bensons. The agreement, as received in evidence, was dated May 21, 1975. It provided for placing the exchange deeds in escrow for delivery upon the negotiation of a new installment sale contract by the Bensons with the Haniches. This was done. The deeds were never delivered. Possession of the real estate was to be given on or before June 2, 1975. The Bensons vacated the Frontier County land about June 1, 1975, and moved to the ranch. Hinn never moved onto the Frontier County land or leased it. The exchange agreement provided for the payment of money by the Bensons to the Hinns in the form of a promissory note, payable in installments over a period of 10 years. The amount

of money to be paid was left blank. Both the Hinns and the Bensons were represented by counsel. The exchange agreement was never recorded at the Register of Deed's office in Frontier County. Arrangements were made for the sale of the Bensons' Frontier County land at auction. Benson sold farm equipment he would not need on the ranch at the auction. The sale was advertised for a date prior to June 17, 1975, but the date was changed at Benson's request because of insufficient advertising time and failure to reserve the growing wheat crop to him. This was not reserved in the exchange agreement.

Stockmen's advertised the auction sale for June 17, 1975, in newspapers in the area. Advertisements for the first sale date are not in evidence. The advertisements of the June 17, 1975, auction stated that Jim Hinn was the owner of the land, and that it would be sold to the highest bidder on the date of the sale without minimum or reservation. Farm machinery was also advertised. It was to be sold to the highest bidder on the date of the sale. Near the bottom of the two advertisements received in evidence the words "Formerly: Bob Benson Property" appeared in large type. One advertisement stated "Immediate possession." Stockmen's was identified as the agent for the seller.

At the auction on June 17, 1975, Benson was present; Hinn was not. Gary Coble was the auctioneer of the land. Al Cheatle assisted. Benson testified that the morning of the auction, his attorney called him and told him that Stockmen's had changed the sale advertising from what he had approved; that they had not reserved the wheat; and that the land would be sold to the highest bidder, and "he didn't think it should be. It has to be accepted by James Hinn." Benson testified he spoke to Cheatle before the sale about what his attorney had told him. There is a conflict in the evidence whether at the opening of the land auction, or at any time thereafter, there was an announcement to the bidders that the sale was subject to the approval

of Jim Hinn or any other person. The trial court made no finding in this respect. The auction was held separately on the two tracts. There was testimony, denied by Benson, that he told the bidders that the fences were good, and that all that was needed was to turn the cattle in and turn on the windmills. Leslie Ruggles was the high bidder on one tract, and Clarence D. Burtch on the other. After offering both tracts together and receiving no bids, Coble announced that Tract 1 was sold to Ruggles and Tract 2 was sold to Burtch. Here, too, there is a conflict in the evidence. Coble testified he said "sold subject to the approval of James Hinn," and other witnesses testified he simply stated "Sold." Ruggles and Burtch testified the price they bid was a fair price, and that there was no change in market value from the date of the auction to the date of Hinn's refusal. Immediately after, Al Cheatle secured checks from Ruggles and Burtch for 15 percent of the bids. These checks have never been presented for payment or returned. Each also signed a document entitled "Purchase Offer, Acceptance and Receipt" offering to purchase the real estate from the Hinns for the amount of the bid. It provided for acceptance by the seller on or before June 18, 1975, and if not accepted by then, it was to terminate. These documents were not signed by Stockmen's or its agents.

Following the auction, later in the afternoon, Benson and another employee of Stockmen's contacted Hinn at the North Platte airport and told him what the land had brought. Cheatle, Ruggles, and Burtch drove to North Platte after the auction. Cheatle said they went to get Hinn's signature on the purchase offers. Hinn did not appear at Stockmen's office, and Burtch and Ruggles left late that evening. Within a few days Cheatle told Ruggles and Burtch that Hinn would not sign the agreements. At one time, there was a suggestion that their bids could be raised, but they refused.

On June 21, 1975, an attorney acting on behalf of Ruggles and Burtch filed a document for recording in the Frontier County Register of Deed's office. It was captioned "Caveat Emptor" and addressed to all persons interested in the Frontier County real estate. It stated in substance that Ruggles and Burtch had purchased the real estate at public auction which was sold by the Hinns pursuant to newspaper advertising; that they were ready to comply with the terms of sale, but the sellers have stated they would not sell the real estate. The document also recited that all persons interested were on notice of the claim, and that the purchasers intended to resort to litigation to enforce their rights.

Neither Ruggles nor Burtch ever spoke to Benson about the sale, before, during, or after it. Benson, Hinn, and representatives of Stockmen's continued fruitless negotiations for about a year with a view to completing the exchange agreement. Ruggles and Burtch also negotiated with Hinn and Stockmen's during that time.

On July 30, 1975, the Hinns brought an action in Logan County to eject the Bensons from the ranch. On February 5, 1976, a judgment evicting the Bensons was entered. That judgment has not been appealed. The Bensons returned to the Frontier County land in May 1976. Except for Ruggles' pasturing of cattle on Tract 1 for a month or two after the auction, the land had been vacant. Benson did harvest and retain the wheat in the summer of 1975. In 1976, Benson applied for a loan and the caveat emptor was discovered on the real estate records. He requested Ruggles and Burtch to release it. They refused, and he brought the action now before this court to quiet title to the real estate on May 18, 1978. Ruggles and Burtch answered and counterclaimed for specific performance and for damages. On April 6, 1979, Ruggles and Burtch brought separate lawsuits against the Bensons, the Hinns, Coble, and Stockmen's. De-

murrers on the grounds of misjoinder filed by Hinn, Coble, and Stockmen's were sustained, and leave was given to separately file and docket separate petitions against them. This case is apparently still pending.

The cases of Ruggles and Burtch against Benson were for specific performance and for damages. The petitions are identical as to the facts alleged except for the real estate involved. So far as is material here, they allege the exchange agreement; that pursuant to it the Bensons caused Hinn, Stockmen's, and Coble to place the real estate up for public auction, to the highest bidder, without reservation on June 17, 1975; that the auction was advertised accordingly; that at all times Coble and Stockmen's were the agents of the Hinns and the Bensons; the auction was conducted by Coble and Stockmen's and with the knowledge, consent, and direction of the Hinns and the Bensons; that the property was sold to Ruggles and Burtch at the auction; and that they are entitled to specific performance. The Bensons' quiet title action was tried to the court on the issue of title to real estate only. The cases of Ruggles and Burtch against the Bensons were tried to the court on the record in the quiet title action on the issue of title to real estate only.

All damage issues were reserved for future trial pending the final determination of title to the real estate.

The trial court quieted title to the Frontier County real estate in the Bensons against Ruggles and Burtch, and entered judgment against them on their specific performance claim against the Bensons. Ruggles and Burtch have appealed.

Ruggles and Burtch contend that (1) they are entitled to specific performance of the agreement to sell the real estate, the terms of which are the advertisement that the auction would be without reserve; (2) they were the high bidders at the auction; (3) the auctioneer announced that the property was sold to them; and (4) they made the downpayment required

in the advertisement. They also argue that Benson is equitably estopped from claiming title to the real estate as against them.

We assume for the purpose of this opinion only that Stockmen's, Coble, and Cheatle were agents of Benson authorized to auction the real estate without reserve.

There is no written contract, note, or memorandum signed by or on behalf of the seller sufficient to satisfy the statute of frauds, Neb. Rev. Stat. § 36-105 (Reissue 1978). In substance, we are asked to amend it to make it inapplicable to real estate. The only authority cited in support of appellants' position is *Zuhak v. Rose*, 264 Wis. 286, 58 N.W.2d 693 (1953). In that case, specific performance was decreed for the high bidder at a public auction of real estate advertised as being without reserve. The court stated that under the circumstances the owner could not complain that the buyer had no memorandum of sale sufficient under the statute of frauds. It cited no authority in support of that holding, but did construct an analogy between sales of real estate and personalty at auction without reserve. Sales of goods at public auction with and without reserve are governed by Neb. U.C.C. § 2-328(3) (Reissue 1971). If the Legislature wishes to make similar provision for auctions of real estate, it may do so.

We decline to follow *Zuhak*. It has been criticized in *Del Rio Land, Inc. v. Haumont*, 118 Ariz. 1, 574 P.2d 469 (1977). Furthermore, conflicting testimony in this case over what was said by the auctioneer is a good illustration of the necessity for the statute of frauds. We judicially notice that auctions are generally not quiet affairs. They carry with them the potential for misunderstandings. Statements made are not recorded.

In a proper case one may be equitably estopped from asserting title to real estate. See *Gillespie v. Sawyer*, 15 Neb. 536, 19 N.W. 449 (1884). However, the doctrine does not apply in this case because Ruggles and Burtch did not suffer injury, detriment, or prejudice to a sufficient degree. *Shelby v. Platte Valley*

Public Power and Irrigation District, 134 Neb. 354, 278 N.W. 568 (1938). Their checks were not presented for payment. They did not improve the real estate. Except for Ruggles pasturing cattle for a short time (a benefit to him), neither took possession of the real estate. Neither really changed his position in reliance upon the acts of Benson, Coble, or Cheatle.

AFFIRMED.

IN RE INTEREST OF JOSHUA AND PINE TERACE MOEN, CHILDREN UNDER 18 YEARS OF AGE. STATE OF NEBRASKA, APPELLEE, V. TIMOTHY MOEN ET AL., APPELLANTS, AND DOROTHY MOEN, APPELLEE.

303 N.W.2d 303

Filed March 20, 1981. No. 43124.

1. **Juvenile Courts: Appeal and Error.** An appeal from the separate juvenile court involving termination of parental rights is determined de novo upon the record by this court.
2. **Parental Rights.** Parental rights may be terminated where the record shows the parents have continuously and repeatedly neglected the children, have refused to give the children necessary parental care and protection, and such action is in the best interests of the children.
3. **Juvenile Courts: Parental Rights.** Where a court order pursuant to Neb. Rev. Stat. § 43-209(6) (Reissue 1978) requires presence of a parent within the jurisdiction of the court for its compliance, a parent who voluntarily leaves the state, making compliance impossible, cannot avail himself of his absence as a basis for setting aside the termination order.

Appeal from the Separate Juvenile Court of Douglas County. Affirmed.

Richard J. Gilloon of Cullan, Cullan & Morrison for appellants.

Donald L. Knowles, Douglas County Attorney, and Francis T. Belsky for appellee.

Heard before KRIVOSHA, C.J., BOSLAUGH, MCCOWN, BRODKEY, WHITE, and HASTINGS, JJ., and MORAN, District Judge.

MORAN, District Judge.

This is an appeal by Timothy Moen, father of Joshua and Pine Terace, from an order of the separate juvenile court of Douglas County terminating parental rights. The mother, Dorothy Moen, has not appealed.

Errors assigned are that the order is not supported by clear and convincing evidence and not in the best interests of the children. We affirm.

At the adjudicative hearing on June 1, 1977, the children were determined to be within the provisions of Neb. Rev. Stat. § 43-202(1) (Reissue 1978). Timothy Moen was then in jail, charged with assault and battery upon Joshua. At the dispositional hearing on July 27, 1977, the court considered psychiatric and psychological evaluations and ordered the parents to participate in counseling and therapy sessions at specific times. Throughout the period of court involvement, however, both parents failed to keep many of the counseling and therapy appointments scheduled by court order.

Review hearings were held on September 19, 1977, March 13, 1978, September 18, 1978, and January 2, 1979. Only the March 13, 1978, hearing disclosed any basis for a belief that the situation was improving. At that time Timothy Moen had been with his family for approximately 6 months after completing his sentence on September 27, 1977. However, within 10 days following the March 13, 1978, hearing, the children were removed from the home by Child Protective Services after Timothy allegedly assaulted Dorothy and refused to permit Dorothy to leave the family home with the children. The children have not been in the custody of either parent since.

At the review hearing on January 2, 1979, the court ordered the parents to obtain suitable housing and

furniture for themselves and the children, secure full-time employment or become involved in a job training program, become involved in a parenting education program on a regular basis, and undergo complete psychiatric evaluation and treatment. They were also ordered to resolve their marital situation by divorce or regular marriage counseling. Timothy Moen was ordered to pay $100 for the support of the children, commencing February 1, 1979.

On June 8, 1979, a motion to terminate parental rights was filed. The hearing, set for August 14, 1979, was continued at the request of Timothy's attorney. It was held on October 24, 1979, immediately after a decree was entered dissolving the marriage of the parents. Timothy Moen appeared by counsel but made no evidentiary showing of any kind. After finding that the children were "within Section 43-209(6) R.S. Nebraska Supp., 1978" and that reasonable efforts under the direction of the court had "failed to correct the conditions leading to the determination previously made in this matter," and that it was in the best interests of the children that the parental rights of the parents be terminated, the court terminated the parental rights.

Timothy Moen left Omaha on September 4, 1978, for California after having enlisted in the armed forces. He has never returned, and he has paid nothing for the support of his wife or children since then. He was discharged from the service in December 1978. He then began living with his mother in Yakima, Washington. In March 1979 he was sentenced to an extended term of imprisonment in Washington for offenses apparently committed before these proceedings began. At all hearings in these proceedings he was present or appeared by his attorney who participated in them on his behalf.

The rules applicable to review of parental rights termination cases in this court are: Trial de novo upon the record; giving findings of fact by the trial court great

weight because it heard and observed the witnesses; affirming those findings unless they are against the weight of the evidence or there is a clear abuse of discretion; and requiring proof by clear and convincing evidence. *State v. Duran*, 204 Neb. 546, 283 N.W.2d 382 (1979); *State v. Souza-Spittler*, 204 Neb. 503, 283 N.W.2d 48 (1979).

Applying these rules, we adopt the findings of the juvenile court as our own and determine from the record as a whole that it is in the best interests of the children that parental rights be terminated.

The primary thrust of Timothy Moen's argument is that he was unable to comply with the order of January 2, 1979, while he was incarcerated. That is at least partially true. However, it is because he voluntarily left the state in September of 1978 that it became impossible for him to comply with the court orders which were designed to correct the situation. This amounted to a substantial abandonment of the children. He is in no position now to take advantage of a condition he brought about by himself.

AFFIRMED.

KRIVOSHA, C.J., concurs in result.

GENE MORRIS, APPELLANT, V. CHRYSLER CORPORATION, APPELLEE.

303 N.W.2d 500

Filed March 20, 1981. No. 43202.

1. **Product Liability.** The theory of strict liability in tort should be distinguished from the theories of liability based on negligence or on breach of warranty, express or implied, in a product liability action.
2. **Product Liability: Negligence.** In a product liability action under a negligence theory, a plaintiff must establish a duty, a breach, causation, and damages.
3. ____:____. When dealing with the liability of a manufacturer of a finished product who puts it on the market to be used without inspection by his customers, if he is negligent, where danger is to be foreseen, there is liability.
4. ____:____. The manufacturer's liability extends to the vendee, to all persons whose right or privilege to use the article is derived from him, to any person to whom the vendee sells or gives the chattel or to whom such subvendee or donee sells or gives the chattel, to damage to property caused by the manufacturer's negligence, and also to damage sustained by the negligently manufactured chattel itself.
5. ____:____. Proof that the chattel left the manufacturer in a defective state, though not conclusive, is evidence of negligence.

Appeal from the District Court for Douglas County: PAUL J. HICKMAN, Judge. Reversed with directions.

Michael J. Dugan and Terry Anderson for appellant.

Patrick B. Donahue of Cassem, Tierney, Adams, Gotch & Douglas for appellee.

Heard before KRIVOSHA, C.J., BOSLAUGH, MCCOWN, BRODKEY, WHITE, and HASTINGS, JJ., and COLWELL, District Judge.

WHITE, J.

This case is on appeal from a judgment of the District Court for Douglas County, Nebraska, in favor of defendant, Chrysler Corporation (hereafter Chrysler), and dismissing the petition of the appellant, Gene Morris. On May 3, 1977, appellant filed suit in municipal court for the city of Omaha, Douglas County, Nebraska. After trial on the merits, the municipal court

judge found in favor of appellant and awarded him damages in the amount of $865. Chrysler appealed to the District Court and the District Court reversed the judgment of the municipal court, finding that appellant had failed to prove that Chrysler was negligent. Appellant assigns as error the findings of the District Court that appellant failed to prove Chrysler had not used ordinary care required of it and that methods of inspection were available to Chrysler, which it failed to employ. The assignments are well taken and the judgment of the District Court is reversed.

Appellant is the owner of a 1968 Chrysler automobile which he purchased secondhand in October 1975. In the late fall 1976, appellant was driving the automobile on the interstate when the engine stopped working. The record shows that after inspection of the automobile by a qualified auto mechanic, it was discovered that the engine had failed because the crankshaft was broken. The mechanic later discovered that the crankshaft had broken because the lower one-half of the number four main bearing was missing. It was the conclusion of the witness that the bearing had not been installed at the factory. Appellant had the engine repaired at a cost of $850. The municipal court and the District Court both found there was a defect in the Chrysler engine; that the defect had caused the damage to appellant's automobile in the normal use of the engine; and that the defect existed when the engine left the manufacturer. The record supports these findings.

This is a product liability action. "Products liability is the name currently given to the area of case law involving the liability of sellers of chattels to third persons with whom they are not in privity of contract. It may, infrequently, rest upon intent; but except in rare instances, it is a matter of negligence, or of strict liability." Prosser, Law of Torts, *Products Liability* 641 (4th ed. 1971). Appellant's original

petition sought damages based on strict liability in tort and breach of warranty. He amended his petition and sued under a breach of warranty theory and a negligence theory. The warranty action was dismissed at the pretrial conference, and appellant proceeded under a cause of action for negligent manufacture of the engine.

In *Hawkins Constr. Co. v. Matthews Co., Inc.*, 190 Neb. 546, 209 N.W.2d 643 (1973), we held that a plaintiff could not recover from a manufacturer under a strict liability in tort theory for damages to plaintiff's property. That decision was vigorously criticized in the dissent, however, and the holding in that case is particularly limited to its facts and has no bearing on this case. The theory of strict liability in tort should be distinguished from the theories of liability based on negligence or on breach of warranty, express or implied. Prosser, Law of Torts, *Strict Liability in Tort* 656 et seq. (4th ed. 1971); 1 Hursh, American Law of Products Liability § 4:1 (2d ed. 1974).

Appellant in this case is proceeding under a negligence theory only. In order for appellant to recover under a negligence theory, he must establish a duty, a breach, causation, and damages. *Rose v. Buffalo Air Service*, 170 Neb. 806, 104 N.W.2d 431 (1960). Concerning the existence of a duty of reasonable care owed to appellant by Chrysler, "'[w]e are dealing now with the liability of the manufacturer of the finished product, who puts it on the market to be used without inspection by his customers. If he is negligent, where danger is to be foreseen, a liability will follow.'" *Rose v. Buffalo Air Service, supra* at 831, 104 N.W.2d at 446.

"A manufacturer who fails to exercise reasonable care in the manufacture of a chattel which, unless carefully made, he should recognize as involving an unreasonable risk of causing physical harm to those who use it for a purpose for which the manufacturer should expect it to be used and to those whom he should

expect to be endangered by its probable use, is subject to liability for physical harm caused to them by its lawful use in a manner and for a purpose for which it is supplied." Restatement (Second) of Torts § 395 at 325 (1965). See, *Hancock v. Paccar, Inc.*, 204 Neb. 468, 283 N.W.2d 25 (1979); *Rose v. Buffalo Air Service*, *supra*.

Liability extends "not only [to] the vendee but also all persons whose right or privilege to use the article is derived from him, unless the nature of the article or the conditions of the sale make it improbable that the article will be resold by the vendee or that he will permit others to use it or to share in its use. Unless the article is made to special order for the peculiar use of a particular person, the manufacturer must realize the chance that it may be sold. . . . [The manufacturer is liable to] any person to whom the vendee sells or gives the chattel, or to whom such subvendee or donee sells or gives the chattel ad infinitum, and also all persons whom such subvendee or subdonee permits to use the chattel or to share in its use." Restatement, *supra* at Comment h at 329-30.

This same liability extends to a person whose property has been damaged, and that person "may . . . recover from such manufacturer for damages to his property caused by [the manufacturer's] negligence in the same manner that such a remote vendee or other third person may recover for personal injuries." *Rose v. Buffalo Air Service*, *supra* at 828-29.

The Restatement, *supra* at Comment n at 332, specifically states that the manufacturer's liability extends also where "the only harm which results from the manufacturer's failure to exercise reasonable care is to the manufactured chattel itself." See illustration 5.

Appellant established Chrysler's breach of its duty by proving that the engine had left the manufacturer in a defective state. Chrysler moved for a directed verdict after appellant's presentation of his case and presented no evidence on its own behalf. Chrysler

argued, and the District Court held, that appellant's proof of a defect was not proof of negligence or lack of ordinary care in manufacturing and inspecting the engine. We disagree. "[O]f course, negligence is never presumed. The burden of proving negligence is on the party alleging it . . . ." *Porter v. Black*, 205 Neb. 699, 705, 289 N.W.2d 760, 764 (1980). However, negligence is a question of fact and it may be proved by circumstantial evidence. The only thing the law requires is that the facts and circumstances proved, along with the inferences that can be drawn from them, indicate with reasonable certainty the negligence of the defendant. *Porter v. Black, supra.*

We have not yet dealt with this specific question in Nebraska; however, the weight of authority holds that although proof of product defectiveness is not conclusive as to negligence, it is evidence of negligence on the part of the manufacturer of the product. *Beals v. Heckendorn Manufacturing Co., Inc.*, 212 Kan. 407, 510 P.2d 1326 (1973); *Maryland Casualty Company v. DeVilbiss Company*, 323 So. 2d 871 (La. App. 1975); *Fields v. Volkswagen of America, Inc.*, 555 P.2d 48 (Okla. 1976); 1 Hursh, American Law of Products Liability § 2:78 (2d ed. 1974).

The appellant presented competent evidence in support of all the necessary elements of his negligence action. He established that Chrysler had manufactured the engine; that he was a foreseeable plaintiff in a products liability action under a negligence theory; that the engine was defectively manufactured and placed on the market; and that, as a direct result of the defect, he incurred damages. Chrysler then had the opportunity to rebut any of the evidence and to establish that it had acted with reasonable prudence. It did not. Appellant has carried his burden and is entitled to recover damages prayed for.

In its answer, Chrysler alleged as an affirmative defense that the statute of limitations had run. The municipal court correctly held that the appellant had

4 years from the date of the damage to file his action. Neb. Rev. Stat. § 25-207 (Reissue 1975). It should be noted, however, that subsequent to the filing of this action, a new statute of limitations for products liability actions was enacted. Neb. Rev. Stat. § 25-224 (Reissue 1979) reads as follows: "Product liability actions; statute of limitations. (1) All product liability actions shall be commenced within four years next after the date on which the death, injury, or damage complained of occurs.

"(2) Notwithstanding subsection (1) of this section or any other statutory provision to the contrary, any product liability action, except one governed by section 2-725, Uniform Commercial Code, shall be commenced within ten years after the date when the product which allegedly caused the personal injury, death, or damage was first sold or leased for use or consumption.

"(3) The limitations contained in subsection (1) or (2) of this section shall not be applicable to indemnity or contribution actions brought by a manufacturer or seller of a product against a person who is or may be liable to such manufacturer or seller for all or any portion of any judgment rendered against a manufacturer or seller.

"(4) Notwithstanding the provisions of subsections (1) and (2) of this section, any cause of action or claim which any person may have on July 22, 1978 may be brought not later than two years following such date."

For the reasons set out above, the decision of the District Court is reversed and the order of the municipal court reinstated.

REVERSED WITH DIRECTIONS.

SOUTHWEST BANK OF OMAHA, A NEBRASKA BANKING CORPORATION, APPELLEE, V. BARBARA A. HERTING, APPELLANT.

303 N.W.2d 504

Filed March 20, 1981. No. 43207.

1. **Negligence.** An action for negligence is based on a legal duty owed by the plaintiff to the defendant which has been breached by the plaintiff.
2. **Contracts: Guaranty: Subrogation.** A guarantor is entitled to be subrogated to the benefit of all the security and means of payment under the creditor's control, and, in the absence of assent, waiver, or estoppel, the guarantor is generally released by an act of the creditor which deprives the guarantor of such right.

Appeal from the District Court for Sarpy County: GEORGE H. STANLEY, Judge. Reversed and remanded.

George A. Thompson of Robinson, Thompson & Hovey for appellant.

Michael A. Nelsen of Schmid, Ford, Mooney & Frederick for appellee.

Heard before BOSLAUGH, MCCOWN, CLINTON, and BRODKEY, JJ., and COADY, District Judge.

COADY, District Judge.

The corporate plaintiff, Southwest Bank of Omaha, filed a petition alleging that the defendant, Barbara Herting, made and delivered to the bank a written loan guaranty whereby she promised to pay part of a loan made by plaintiff to another corporation, Mid-Con, Inc., in the event that Mid-Con, Inc., failed to pay. In answer thereto, the defendant denied some of the plaintiff's allegations and alleged that she had two negligence actions in defense. In substance, she pointed out that a security interest in certain property worth $22,000 had been given the plaintiff by Mid-Con; that the assets were then listed in an action in the U. S. District Court by Mid-Con, Inc., which had filed bankruptcy proceedings; and that the assets were sold, with the negligent consent of plaintiff, for

$4,000 rather than for their full value and to her detriment. The defendant's second defense, in substance, was that the bankruptcy court assigned certain accounts receivable of Mid-Con to plaintiff and that plaintiff has failed and refused to collect them.

In response thereto, the plaintiff filed a demurrer under Neb. Rev. Stat. § 25-820 (Reissue 1979) to the pleading of negligent consent. The plaintiff also filed a motion to strike the pleading of the alleged failure to collect accounts receivable. After a hearing thereon, the trial court granted both the demurrer and the motion to strike. Thereafter, defendant elected to stand upon the pleadings, the plaintiff filed a motion for summary judgment, a hearing was had, and the trial court granted summary judgment against the defendant. The defendant appealed, and we reverse.

It is fundamental that for the purpose of determining the sufficiency of the facts alleged in the answer for damages or setoff for negligence to which a demurrer is interposed, the demurrer admit all facts well pleaded, but not those not well pleaded or conclusions of law. An action for negligence is based on a legal duty owed by the plaintiff herein to the defendant which has been breached by the plaintiff. *Root v. School Dist. No. 25*, 184 Neb. 570, 169 N.W.2d 464 (1969).

It is difficult to make liability arise from tortious acts if the liability really and originally arises from contract. The duty of plaintiff is not discussed in plaintiff's brief, but the defendant, in her brief, relies on the case of *Custom Leasing, Inc. v. Carlson Stapler & Shippers Supply, Inc.*, 195 Neb. 292, 298, 237 N.W.2d 645, 649 (1976), wherein it is stated: "The general rule is that a surety or guarantor is entitled to be subrogated to the benefit of all the security and means of payment under the creditor's control and . . . the [guarantor's] obligation is reduced pro tanto if the creditor (a) surrenders or releases the security, or (b) wilfully or negligently harms it, or (c) fails to take reasonable

action to preserve its value at a time when the [guarantor] does not have an opportunity to take such action." Assuming that case sets forth the duties of a creditor to his guarantor, an inspection of the amended answer discloses no facts or inferences from well-pleaded facts which state a cause of action. The natural inferences from her pleading indicate that the bankruptcy court had control of the security rather than plaintiff. But the deciding thing is that the pleading merely relates to a consent to a court sale rather than (a) surrender or release of the security and (c) avoids any inference whatsoever that plaintiff failed to take reasonable action to preserve its value at a time when the guarantor did not have an opportunity to protect her right of subrogation. Because the defendant had neither pleaded an action in accordance with her own proffered legal authority nor pleaded any duty contained in the terms of the written guaranty itself, we decline to now overrule plaintiff's demurrer.

In pleading her second defense of negligence, the defendant set out five specific accounts receivable, together with the following words: "That the Plaintiff was assigned the accounts receivable of the Principal Debtor [Mid-Con, Inc.] above listed and has failed and refused to take timely action to collect the same and to reduce the debt of the Principal Debtor all to the detriment of the Defendant." These allegations were not demurred to, but were attacked by a motion to strike under Neb. Rev. Stat. § 25-833 (Reissue 1979), and plaintiff asks that these words be declared scandalous. True or not, the words are relevant, not scandalous, and the reader should note, at this point, that it is never wise to ask for something without being fully aware that you may just get what you ask for. *State ex rel. Beck v. Associates Discount Corp.*, 162 Neb. 683, 77 N.W.2d 215 (1956).

We have examined the bill of exceptions made up as a result of the hearing on the motion for summary

judgment. While it might be strongly argued that the bill shows that there is no genuine issue of fact or law between the parties as to the defense of negligence by consent, we need not decide that because of our ruling sustaining the demurrer. On the other hand, said bill of exceptions contains no evidence in regard to the defense of negligent collections which was never properly stricken or demurred to.

Therefore, the judgment is reversed and the cause remanded to the trial court for further proceedings.

REVERSED AND REMANDED.

JAMES HOLLINGSWORTH, APPELLANT, V. BOARD OF EDUCATION OF THE SCHOOL DISTRICT OF ALLIANCE, APPELLEE.

303 N.W.2d 506

Filed March 20, 1981. No. 43210.

1. **Appeal and Error.** An error proceeding has for its purpose the removal of the record from an inferior to a superior tribunal to determine if the judgment or final order entered is in accordance with law.
2. **Teacher Contracts: Tenure.** There are few, if any, objective criteria for evaluating teacher performance or for determining what constitutes just cause for terminating teaching contracts of tenured teachers. Each case must, therefore, be assessed on its own facts.
3. **Teacher Contracts: Words and Phrases.** As used in Neb. Rev. Stat. § 79-1254 (Reissue 1976), the term just cause shall mean incompetency, neglect of duty, unprofessional conduct, insubordination, immorality, physical or mental incapacity, or other conduct which interferes substantially with the continued performance of duty.
4. **Teacher Contracts.** Incompetency or neglect of duty is not measured in a vacuum nor against a standard of perfection, but, instead, must be measured against the standard required of others performing the same or similar duties.

Appeal from the District Court for Box Butte County: ROBERT R. MORAN, Judge. Reversed with directions.

Holtorf, Kovarik, Nuttleman & Ellison, P.C., for appellant.

Reddish, Curtiss, Moravek & Danehey for appellee.

Heard before KRIVOSHA, C.J., MCCOWN, WHITE, and HASTINGS, JJ., and MURPHY, District Judge.

MURPHY, District Judge.

This is an error proceeding to challenge the action of the defendant, Board of Education of the School District of Alliance, Nebraska, terminating the plaintiff's teaching contract. The District Court affirmed the action of the Board of Education, finding that there was sufficient evidence to justify termination for just cause insofar as the plaintiff was unable to control his classroom and to handle student misbehavior and the plaintiff's personal hygiene adversely affected his performance as a teacher. From this decision of the District Court the plaintiff has appealed.

The plaintiff, James Hollingsworth, was employed by the school board for the school years 1976-77 and 1977-78 as a Life Science teacher for the seventh grade in the Alliance Middle School. On April 28, 1978, the plaintiff entered into a contract with the school board as a tenured teacher for the 1978-79 school year. As a tenured teacher, Mr. Hollingsworth continued to teach Life Science to 110 seventh-grade students in the Middle School until May of 1979.

An error proceeding has for its purpose the removal of the record from an inferior to a superior tribunal to determine if the judgment or final order entered is in accordance with law. *Dovel v. School Dist. No. 23*, 166 Neb. 548, 90 N.W.2d 58 (1958); *Sanders v. Board of Education*, 200 Neb. 282, 263 N.W.2d 461 (1978). Therefore, the District Court and this court, on appeal, must determine if the evidence presented at the hearing before the school board on May 1, 1979, is sufficient, as a matter of law, to support the determination of the school board.

As stated in *Sanders v. Board of Education, supra* at 289, 263 N.W.2d at 465: "There are few, if any, objective criteria for evaluating teacher performance or for

determining what constitutes just cause for terminating teaching contracts of tenured teachers. Each case must, therefore, be assessed on its own facts."

It follows that, in order to resolve the crucial issue as to whether there was sufficient evidence, as a matter of law, to constitute just cause for the termination of Mr. Hollingsworth's contract, a detailed review of the record before the school board is essential.

That record demonstrates Mr. Hollingsworth's academic background. He received a bachelor of science in education degree from Marion College and a master's in education degree from Ball State University. His academic qualifications are not in dispute.

At the school board hearing of May 1, 1979, testimony was adduced from seven witnesses, including Mr. Hollingsworth. Fifty-three exhibits were offered and received in evidence.

The first witness, Larry Grosshans, testified that he was principal of Alliance Middle School consisting of grades six, seven, and eight. As principal he was responsible for evaluating all teachers in the Middle School. On April 3, 1979, Mr. Grosshans recommended that Mr. Hollingsworth's teaching contract not be renewed because his performance was unsatisfactory in the following respects: "1. He has left his classroom unattended while students were present; 2. He has been unable to handle student misbehavior; 3. He has been unable to control his classroom; 4. He lacks rapport with students; 5. He lacks rapport with parents; 6. He does not have a good relationship with fellow staff members; 8. [sic] His personal appearance, mouth and body odor, has [sic] interfered with his performance; 9. He has not been punctual for classes." Mr. Grosshans recommended the termination of Mr. Hollingsworth's contract because of "(1) incompetency; (2) neglect of duty; (3) unprofessional conduct and (4) other conduct which interferes substantially with the continued performance of duties."

Mr. Grosshans stated that he based his conclusion

that Mr. Hollingsworth failed to maintain control of his classes on reports from students and parents in regard to discipline problems, personal observation in visiting the classroom, and a survey of 50 students.

Each of Mr. Grosshans' visits to the classroom were verified by a written visitation and observation report of Mr. Grosshans. These records show that Mr. Grosshans first visited Mr. Hollingsworth's classroom on September 20, 1976, when Mr. Hollingsworth first commenced his teaching career at the Alliance Middle School. Mr. Grosshans reported the following: "The lesson was considered meaningful and relevant. The arrangement and organization of the room was good considering its limitations. Collection of materials for student use was excellent. Student comments included, 'fun class,' 'interesting,' 'knowledgeable teacher,' 'easy,' etc. Overall, it was a good class but suggest you note the following. Several students were wasting time on occasion and 'messing around.' Suggest you 'clamp' down on these students and maybe talk to entire class about their *talking.* Too many were talking when you did." Classroom visits were made on October 21, 1976, and November 22, 1976. Written reports of these visits show no criticism by Mr. Grosshans.

On January 7, 1977, Mr. Grosshans compiled a "Teacher Appraisal Instrument" in regard to Mr. Hollingsworth. Out of 37 qualities listed, Mr. Hollingsworth received 36 plus ratings and one minus rating. This report contains the only mention of Mr. Hollingsworth's having an odor problem. In the same report Mr. Grosshans recommends renewal of his contract for the 1977-78 school year.

The next classroom visit by Mr. Grosshans took place on September 16, 1977, the beginning of Mr. Hollingsworth's second year as a teacher at Alliance. Mr. Grosshans commended Mr. Hollingsworth for good classroom control and management, and concluded by stating: "Jim — this was one of the better examples of teaching I have seen."

Visitations to the Hollingsworth classroom on October 21, 1977; November 30, 1977; January 13, 1978; February 6, 1978; February 10, 1978; and February 16, 1978, were uniformly praiseworthy of Mr. Hollingsworth's teaching ability and classroom control.

Mr. Hollingsworth's first year as a tenured teacher commenced in September 1978. Classroom visits were made by Mr. Grosshans on September 15, 1978, and October 24, 1978. His written reports of these visits contained no criticism.

On November 15, 1978, 2½ months before asking for his resignation, Mr. Grosshans made another visit to Mr. Hollingsworth's classroom and wrote in his report: "Mr. Hollingsworth exhibited good poise and confidence through today's lesson. Planning and organization were good. Mr. Hollingsworth also maintained good control of the class. When he asked for attention, he got it — when he asked for quiet, he got it, etc."

The final visitation report which was received in evidence pertains to a visit on December 20, 1978. Again, the report was generally praiseworthy, but a suggestion was made that students sharpen pencils before class begins.

On January 31, 1979, Mr. Grosshans asked for Mr. Hollingsworth's resignation. The record is silent as to any events occurring between the last classroom visit on December 20, 1978, which was satisfactory, and the request for resignation 40 days later.

On February 12, 1979, Mr. Grosshans met with the school board in executive session, at which time the school board was informed of the request for Mr. Hollingsworth's resignation and his failure to comply with that request.

Mr. Grosshans testified that school records demonstrate that Mr. Hollingsworth's student referrals to the assistant principal for disciplinary reasons were excessive when compared to referrals by other teachers. According to Derald Morgan, the assistant

principal who compiled these records, they show 27 student referrals by Mr. Hollingsworth. However, he admitted on cross-examination that 22 of the total referrals came after February 6, 1979. In other words, before he was asked to resign, Mr. Hollingsworth had a total 5 referrals for discipline.

On March 26, 1979, 1 week before he recommended the termination of the Hollingsworth contract to the school board, Mr. Grosshans conducted a survey of 50 students in regard to their relationship with Mr. Hollingsworth. On cross-examination Mr. Grosshans admitted that, despite his efforts to conceal the purpose of his survey, the students could have been aware of its purpose. It was on the basis of this survey and his class visitations that Mr. Grosshans concluded that Mr. Hollingsworth lacked rapport with the students. None of the students testified.

Mr. Grosshans testified that on one occasion he discovered Mr. Hollingsworth's class unattended. Again, on cross-examination he admitted that he later learned that Mr. Hollingsworth had received a severe shock from electrical machinery and was recovering in the faculty lounge.

Mr. Grosshans admitted that Mr. Hollingsworth put in longer hours than any other teacher and often volunteered for additional work, such as the compilation of the school yearbook.

The basis of Mr. Grosshans' evaluation of Mr. Hollingsworth is illustrated by a consideration of his answer to the following question by the school board's attorney: "Q. In making your evaluation, Mr. Grosshans, did you consider Mr. Hollingsworth's performance in a vacuum or did you take into consideration what the other teachers are accomplishing in the same school with the same teachers or the same students? A. I took into consideration the performance level criteria which was established in the Teacher Manual and the areas of teacher performance which are expected. My evaluation is not based on a

comparison of Mr. Hollingsworth's performance with other staff members' performance."

The staff manual referred to in Mr. Grosshans' above answer was received in evidence. This manual contains the rules and regulations for the orderly and efficient operation of the school on an everyday basis. There are no standards or criteria by which to measure or gauge the performance of an individual teacher.

Mr. Derald Morgan was the next witness called. He testified that the present year was his first as assistant principal of the Alliance Middle School. One of his duties as assistant principal was student control and discipline. Mr. Morgan related that he had no basis for comparing this year's discipline referrals with previous years. He stated that he did not know the total number of referrals for the present year. On cross-examination he admitted that 81 percent of all Mr. Hollingsworth's discipline referrals came after February 6, 1979. He also admitted that the events which occurred about that time (the request for Mr. Hollingsworth's resignation on January 31, 1979) "may have some bearing on what's happened in the classroom."

The athletic director, Robert L. Morris, next took the stand. Mr. Morris gave his opinion that Mr. Hollingsworth lacked rapport with his fellow coaches and the student athletes. In the fall of 1978 Mr. Hollingsworth coached cross-country for the boys and girls. To illustrate his point, Mr. Morris reported that two girls on Mr. Hollingsworth's team put sugar in Mr. Hollingsworth's gas tank, and on another occasion the windows of his car were soaped.

On cross-examination Mr. Morris admitted that, in his evaluation report of Mr. Hollingsworth as a coach, he rated Hollingsworth average or above average in 13 categories and below average in only two. In this report dated October 30, 1978, Mr. Morris had the following comments: "Coach Hollingsworth is a good

organizer. He also pursues different avenues in an attempt to motivate athletes. His work is well done."

William E. Stout, a teacher of Earth Science at the Middle School, testified that he was the coach of cross-country prior to Mr. Hollingsworth's appointment to that position. He stated that his relationship with Mr. Hollingsworth deteriorated when Mr. Hollingsworth wrote a letter to Mr. Grosshans complaining about Mr. Stout's interference with his duties as coach. He also testified that he noticed a problem about breath and body odors with respect to Mr. Hollingsworth. The record is silent as to when, how often, or whether he noticed a worsening or improvement of this situation. Other than Mr. Grosshans, Mr. Stout is the only witness who testified from personal observation as to this problem.

Shirley Mae Schlenker, a physical education teacher, testified that her office was next door to Mr. Hollingsworth's classroom, and on many occasions she had observed students in the hallways. However, she admitted that this was not unusual for any teacher. She reported a locker room comment about Mr. Hollingsworth's personal hygiene by an unnamed female student. She also observed that many of her fellow coaches considered Mr. Hollingsworth to be distant.

The final witness for the school board was Leonard R. Hartman, an eighth-grade mathematics teacher. Mr. Hartman stated that Mr. Hollingsworth's relationship to other faculty members was distant but that in the last year Mr. Hollingsworth had "put more effort into being accepted by the staff." Mr. Hartman had no personal knowledge of any hygiene problems but noted that students had complained. He was unaware of any discipline problems encountered by Mr. Hollingsworth.

At this point the attorney for the school board rested, and Mr. Hollingsworth testified in his own behalf. He described his brief but successful career as a cross-

country coach. Complimentary letters from students were offered and received in evidence. Mr. Hollingsworth described the dental problems which he had when he first came to Alliance. To correct this problem he incurred dental expenses in the amount of $1,500. He stated that perhaps complaints about body odor were because the temperature in his classroom was often 80 degrees and the nature of his subject required him to move around frequently. He explained that the coaches who are also teachers held Wednesday night poker parties at which he consistently lost because he did not play cards in college. He stated that he "didn't fit in with the drinking, either." Therefore, he no longer attended the poker parties. He stated that he had made an effort to be accepted by the faculty. He further testified that he had worked the entire summer of 1978 in an effort to devise a teaching program that would accommodate the varying learning abilities of his students. Finally, he indicated that he would be happy to give up his cross-country coaching position and devote his every effort to his Life Science teaching if the school board would permit him. On cross-examination Mr. Hollingsworth testified that, when he was having a successful cross-country season, he was full of confidence in the classroom. He admitted that his confidence was "dented" when the principal asked him to resign.

On May 7, 1979, the school board voted to terminate Mr. Hollingsworth's teaching contract for just cause. The school board made the following findings of fact: "1) You frequently left your classroom unattended while students were present. 2) You have been unable to control your classroom. 3) You have been unable to handle student misbehavior. 4) You lack rapport with students. 5) You do not have a good relationship with fellow staff members. 6) Your personal appearance (odor) has interfered with your performance." The school board then found there existed just cause to terminate the contract on the following grounds:

"1) incompetence; 2) neglect of duty; 3) unprofessional conduct; and 4) other conduct which interferes substantially with the continued performance of duties."

In an error proceeding the evidence at the school board hearing was reviewed by the District Court where the action of the school board was affirmed.

Neb. Rev. Stat. § 79-1254 (Reissue 1976) provides that the contract of a tenured teacher cannot be terminated except for just cause. As used in this section, the term just cause shall mean incompetency, neglect of duty, unprofessional conduct, insubordination, immorality, physical or mental incapacity, or other conduct which interferes substantially with the continued performance of his duties.

The District Court, in its journal entry of October 5, 1979, concluded that the school board's finding of incompetence and other conduct which interfered substantially with Mr. Hollingsworth's continued performance of duties was warranted because: (a) Plaintiff was unable to control his classroom and to handle student misbehavior; and (b) Plaintiff's personal hygiene adversely affected his performance as a teacher.

The question before this court is whether the record is sufficient, as a matter of law, to establish just cause. We find that it is not.

In building its case against Mr. Hollingsworth, the school board has fashioned a house of straw which cannot stand in the fresh breeze of careful analysis. Again and again the testimony of Mr. Grosshans is contradicted by his written observations in regard to Mr. Hollingsworth's ability as a teacher, his classroom control, and his discipline for a period extending over 2½ years. Mr. Hollingsworth's referrals to the assistant principal for disciplinary reasons were few in number until the request for his resignation and the transmittal of that information to the school board immediately thereafter. Although the record is silent as to whether the student body gained knowledge of

this request for his resignation, their behavior would indicate that many students were aware that their teacher's position with the administration was not what it was when he was granted tenure. It was not until a week before his recommendation of termination to the school board that Mr. Grosshans undertook his survey of 50 students. Knowledge of Mr. Hollingsworth's status with the administration and peer pressure are factors to be considered in their responses. Although strict adherence to the rules of evidence cannot be demanded or even expected at a hearing before a school board, when a teacher's career hangs in the balance, the basic principles of due process demand that hearsay statements of students be given little, if any, weight. Certainly this is true with respect to the hearsay comment of an unidentified female student to her physical education teacher.

Only two witnesses testified that they personally detected body or breath odors when coming in contact with Mr. Hollingsworth. Again, the record is silent as to when, where, and for how long these odors were detected. The written evidence of this problem is in a reference on January 7, 1977, during a classroom visit by Mr. Grosshans. On his many visits after that date, there is no further mention of an odor problem. Mr. Hollingsworth testified that he believed the problem to be solved after extensive dental work, which was performed shortly after his arrival in Alliance. In any event, a man's profession and his status as a tenured teacher should not depend on the olfactory sensitivity of only two members of a teaching staff. At the very least he should be given an opportunity to take whatever action is necessary to avoid giving offense in the future.

Furthermore, it would appear that Mr. Grosshans' evaluation of Mr. Hollingsworth is suspect because, in his own words, he failed to compare Mr. Hollingsworth's performance with other staff members' performance. Incompetency or neglect of duty are not

measured in a vacuum nor against a standard of perfection, but, instead, must be measured against the standard required of others performing the same or similar duties. *Sanders v. Board of Education*, 200 Neb. 282, 263 N.W.2d 461 (1978).

Finally, a careful review of the entire record would indicate that for 2½ years Mr. Hollingsworth was a competent and industrious teacher. There is nothing in the record to reveal what prompted the decision to ask for his resignation on January 31, 1979. It does appear that, from that date forward, the administration commenced a systematic and diligent search for evidence which would justify the decision which had already been reached. That search has failed.

The judgment of the District Court in affirming the action of the school board is in error and is therefore reversed, with directions that the school board's action be vacated and Mr. Hollingsworth restored to his status as a tenured teacher with full compensation from the date of his termination.

REVERSED WITH DIRECTIONS.

WALTER E. BUMGARNER ET AL., APPELLEES AND CROSS-APPELLANTS, V. COUNTY OF VALLEY ET AL., APPELLANTS AND CROSS-APPELLEES.

303 N.W.2d 307

Filed March 20, 1981. No. 43239.

1. **Taxation: Valuation.** The classification of land as to kind or character of use does not alone establish the actual value of the land. The classification is only one of many factors to be considered in determining the actual value.
2. **Taxation: Valuation: Appeal and Error.** In an appeal to the District Court from the action of the county board of equalization fixing the value of real property for tax purposes, the court shall affirm the action taken by the board unless evidence is adduced establishing that the

action of the board was unreasonable or arbitrary, or unless evidence is adduced to establish that the property of the appellant is assessed too low.

3. ____: ____: ____ In an appeal to the county board of equalization or to the District Court, and from the District Court to this court, the burden of proof imposed on the complaining taxpayer is not met by showing a mere difference of opinion unless it is established by clear and convincing evidence that the valuation placed upon his property when compared with valuations placed on other similar property is grossly excessive and is the result of a systematic exercise of intentional will or failure of plain duty and not mere errors of judgment.

4. **Taxation: Valuation.** A claim of disproportionate assessment is not sustained when supported only by opinion evidence that the property is assessed at a higher proportion to its actual value than some other property. Such a contention must be sustained by evidence that the valuation is arbitrary or capricious or so wholly out of line with actual values as to give rise to an inference that the assessor and county board of equalization have not properly discharged their duties.

Appeal from the District Court for Valley County: JAMES R. KELLY, Judge. Reversed and remanded with directions.

Gregory G. Jensen, Valley County Attorney, for appellants.

L. W. Cronk of Weems & Sikyta, P.C., for appellees.

Heard before BOSLAUGH, MCCOWN, CLINTON, and BRODKEY, JJ., and COADY, District Judge.

MCCOWN, J.

The plaintiffs appealed to the District Court from the 1979 tax assessment made by the Valley County Board of Equalization on a certain tract of real property owned by the plaintiffs. The District Court found that the value of the land for tax purposes, exclusive of the value of buildings and improvements, was $4,500 rather than $8,640 and directed the county officers to correct their records and the total tax assessment accordingly. The County of Valley has appealed and the plaintiffs have cross-appealed.

The plaintiffs are owners of a 3-acre tract of real property located in Arcadia, Valley County, Nebraska.

1.79 acres of the tract is in alfalfa and the remainder of the tract contains a warehouse, a garden, a fruit orchard, and a residence. The plaintiffs are bee-keepers and honey farmers. The tract is not subdivided or platted.

In 1978 plaintiffs' property and the other properties in the village of Arcadia were reappraised as part of a countywide reappraisal. Midwest Appraisal Company used an appraisal form which listed and valued the land and the buildings and improvements on the land separately and combined those valuations to compute the total appraised value of the real estate for tax purposes.

The initial appraisal valued the land portion of plaintiffs' 3-acre tract at $2,220 and the buildings and improvements at $26,625. Complaints were made by neighboring property owners that the valuation of plaintiffs' land was too low in comparison to theirs. The president of the appraisal company, who was a licensed real estate appraiser, inspected the plaintiffs' property and several other properties in the village of Arcadia, reviewed the appraisals, and determined that the portion of plaintiffs' property value attributable to land should be raised to $11,500. The plaintiffs protested. Upon review the appraisal company determined that the undeveloped portion of plaintiffs' property, which was in alfalfa, should be valued on a per-acre basis, and the developed portion should be valued on a front-foot basis. By applying the two different methods the value of plaintiffs' property attributable to land was reduced from $11,500 to $9,285. The value attributable to land and buildings remained unchanged. The plaintiffs then filed a protest with the county board of equalization.

Several members of the board of equalization personally examined plaintiffs' property and other comparable properties. The county assessor also examined and reevaluated plaintiffs' property and recommended to the board a reduction in the appraisal

values of the land portion of plaintiffs' property to $8,640, using a similar two-formula classification and computation basis. At the hearing, the board accepted the assessor's recommendation and lowered the valuation of the land portion of plaintiffs' real estate to $8,640. The valuation of $26,625 for buildings and improvements remained unchanged and the total valuation of plaintiffs' property for tax purposes was set at $35,265. The assessed value of plaintiffs' property was fixed at 35 percent of that value as provided by law. The plaintiffs appealed the assessment to the District Court, alleging it to be excessive and arbitrary.

Plaintiffs' evidence was that certain other lands in Arcadia, which a real estate appraiser believed to be comparable, were used for agricultural purposes and were valued for tax purposes at an average value of about $700 per acre. The county, on the other hand, introduced evidence of several properties which it deemed comparable in which the land portion of the tax valuation ranged from $3,982 to $6,796 per acre in comparison with a value of $2,880 per acre for plaintiffs' tract. The plaintiffs produced no evidence as to the actual value of plaintiffs' property, nor of any of the allegedly comparable properties. Neither did the plaintiff produce any evidence as to the actual value of the land, without buildings and improvements, on either plaintiffs' property or any allegedly comparable property.

The District Court found that there was no logical reason for valuing a portion of plaintiffs' land on a front-foot basis and the balance on an acreage basis. The court then determined that the taxable value of plaintiffs' land, without buildings or improvements, should be $1,500 an acre, or $4,500, rather than $8,640, and directed the county officers to correct their records and the assessment accordingly. The county has appealed and the plaintiffs have cross-appealed.

Plaintiffs do not contend that the valuation of their property for tax purposes exceeds the actual value of the property nor do they contend that their property was assessed for tax purposes at more than 35 percent of its actual value. They contend instead that plaintiffs' property was used for agricultural purposes and that all of the land should, therefore, be classified as agricultural land and valued and taxed at the same valuation per acre as other agricultural lands which plaintiffs' witness deemed to be comparable.

This court has very recently answered plaintiffs' contention that classification of land as to kind or character of use does not alone establish the actual value of land, and that classification is only one of many factors to be considered in determining the actual value of land. See *Otradovsky v. Board of Equalization*, 206 Neb. 559, 294 N.W.2d 334 (1980). In *Otradovsky* we reaffirmed the principles set out in *County of Gage v. State Board of Equalization & Assessment*, 185 Neb. 749, 750-51, 178 N.W.2d 759, 761 (1970): "The Constitution requires that such a property tax be '* * * levied by valuation uniformly and proportionately upon all tangible property * * *.' Examination of the record discloses extensive divergence among witnesses of all categories in their understanding of the meaning of uniform values in the constitutional tax context. Many witnesses seem to assume that real property taxes may be equalized if property is classified, and the same values applied to the same classifications of property in all counties. The Constitution itself flatly contradicts such a conclusion. Art. VIII, § 1, Constitution of Nebraska."

While an appeal from a county board of equalization is heard as in equity and is tried de novo, Neb. Rev. Stat. § 77-1511 (Reissue 1976) requires that: "The court shall affirm the action taken by the board unless evidence is adduced establishing that the action of the board was unreasonable or arbitrary, or unless evidence is adduced establishing that the property of the appellant is assessed too low."

In an appeal to the county board of equalization or to the District Court, and from the District Court to this court, the burden of persuasion imposed on the complaining taxpayer is not met by showing a mere difference of opinion unless it is established by clear and convincing evidence that the valuation placed upon his property when compared with valuations placed on other similar property is grossly excessive and is the result of a systematic exercise of intentional will or failure of plain duty, and not mere errors of judgment. *Hastings Building Co. v. Board of Equalization*, 190 Neb. 63, 206 N.W.2d 338 (1973).

This court has consistently reaffirmed the principles set out in *Newman v. County of Dawson*, 167 Neb. 666, 672, 94 N.W.2d 47, 50 (1959), where we said: "It has been frequently recognized by this court that absolute or perfect equality and uniformity in taxation cannot be attained. Something more than a difference of opinion must be shown. It must be demonstrated by evidence that the assessment is grossly excessive and is a result of arbitrary or unlawful action, and not a mere error of judgment. A claim of disproportionate assessment is not sustained when supported only by opinion evidence that the property is assessed at a higher proportion to its actual value than some other property. Such a contention must be sustained by evidence that the valuation is arbitrary or capricious, or so wholly out of line with actual values as to give rise to an inference that the assessor and county board of equalization have not properly discharged their duties. Mere errors of judgment do not sustain a claim of discrimination. There must be something more, something which in effect amounts to an intentional violation of the essential principle of practical uniformity." See, also, *Nash Finch Co. v. County Board of Equalization*, 191 Neb. 645, 217 N.W.2d 170 (1974).

In the evaluation of real property for tax purposes, where buildings and improvements are taxable as a part of the real estate, the critical issue is the actual

value of the entire property, not the proportion of that value which is allocated to the land or to the buildings and improvements by the appraiser. In the present case the plaintiffs' evidence wholly fails to establish the actual value of plaintiffs' property or of any properties claimed to be comparable. There is no evidence that the plaintiffs' property was assessed at a higher proportion of its actual value than other allegedly comparable property. The evidence establishes only that plaintiffs' land, without improvements, was valued at a different price per acre than some other lands allegedly comparable.

The evidence in this case totally failed to establish that the valuation established by the county board of equalization was excessive, unreasonable, or arbitrary. The judgment of the District Court is, therefore, reversed with directions to affirm the valuation and assessment established by the Valley County Board of Equalization on May 14, 1979.

REVERSED AND REMANDED WITH DIRECTIONS.

TILLIE KRUG, MOTHER AND NEXT FRIEND OF JESSIE FRANK KRUG, A MINOR, AND TILLIE KRUG, INDIVIDUALLY, APPELLEES, V. DALE THURSTON LAUGHLIN, APPELLANT.

303 N.W.2d 311

Filed March 20, 1981. No. 43322.

1. **Directed Verdict.** A trial court should direct a verdict as a matter of law only when the facts are conceded, undisputed, or such that reasonable minds can draw but one conclusion therefrom.
2. ——. To test the evidence for a jury question, the trial court must resolve every controverted fact in favor of the party against whom a verdict is sought and give that party the benefit of every inference which can reasonably be drawn from the evidence presented.
3. **Directed Verdict: Negligence: Juries.** In all actions brought to recover damages for injuries to a person or his property, all questions of negligence and contributory negligence shall be for the jury. Neb. Rev. Stat. § 25-1151 (Reissue 1979).

4. **Jury Verdicts: Appeal and Error.** A jury verdict will not be disturbed unless it is clearly erroneous and against the preponderance of the evidence.

Appeal from the District Court for Douglas County: THEODORE L. RICHLING, Judge. Affirmed.

Jeffrey A. Silver for appellant.

David L. Herzog and George W. Rubagumya for appellees.

Heard before BOSLAUGH and WHITE, JJ., and RONIN, KELLY, and BARTU, District Judges.

BARTU, District Judge.

This appeal is taken from jury verdicts and judgments thereon in a negligence action resulting from an automobile-motorcycle accident at the intersection of 36th and Q Streets in Omaha, Nebraska, on June 16, 1979. Jessie Frank Krug was awarded judgment of $12,866.20 and Tillie Krug, his mother, was awarded judgment of $7,133.80 against Dale Thurston Laughlin. The issues of negligence, contributory negligence, and damages were tried to the jury.

Appellant makes two assignments of error: (1) The verdicts and judgments are not supported by the evidence; and (2) The trial court erred by overruling defendant's motions for directed verdicts upon prima facie negligence and/or plaintiff's contributory negligence at the close of plaintiffs' case and again at the close of defendant's case.

The collision occurred on the 16th day of June 1979 at the intersection of 36th and Q Streets in Omaha, Nebraska. Jessie Krug and a fellow employee, Wilbur Driscoll, had just left work and were riding their motorcycles eastbound on Q Street. They rode side by side most of the way until they came close to the intersection when Driscoll fell in behind Krug in the curb lane.

The intersection has no special turning lanes for either of the streets. A vehicle intending to turn through

the intersection must use the lane closest to the centerline. As they approached the intersection at 30 to 35 miles per hour, Driscoll saw that the traffic light was green. The speed limit on Q Street is 35 miles per hour. At the time Krug was about 3 or 4 feet from the intersection, Driscoll saw a 1973 Chevrolet vehicle driven by the defendant start to turn left to go south on 36th Street from a westbound direction on Q Street. Driscoll saw Krug react to Laughlin's turn by attempting to turn his motorcycle to the left so as to avoid the collision. Driscoll was following close enough behind Krug that the immediacy of the accident caused him to ride over Krug's motorcycle tire after its collision with Laughlin's vehicle.

Krug testified that the only things he remembers prior to and after the accident are that he knew the traffic light was green and that he was traveling at about 34 miles per hour immediately prior to the collision.

As Laughlin approached the intersection, the light was red and he stopped, intending to make a left turn when the light turned green. As the light changed he observed two vehicles traveling east on Q Street in the curb lane. He allowed the eastbound vehicles to go through and then proceeded into the intersection commencing his left-hand turn. As he started to turn left he noticed the motorcycles approaching at a distance he estimated to be a block. He only looked at the motorcycles once as he began his turning maneuver. He made his turn at a speed of about 3 to 4 miles per hour and there were no pedestrians in the intersection to whom he had to yield the right-of-way. From the time he started to turn left to the time of impact took about 4 seconds.

At the time of the accident, Laughlin suffered with binocularity eyesight disability.

Laughlin's wife, a passenger in the vehicle driven by her husband, saw the motorcycles at about a block's distance side by side as they approached the intersec-

tion. She did not warn her husband about the rapid approach of the motorcycles, and she testified that the plaintiff and Driscoll were riding side by side at impact.

After the collision Laughlin's vehicle was facing southwest and had little or no movement after impact.

Gregory Hoffman, an Omaha police officer, observed the defendant's 1973 Chevrolet facing a southwesterly direction in the intersection with the plaintiff's motorcycle resting up against its right rear quarter panel as he arrived at the accident scene. The defendant advised Hoffman that he was westbound on Q Street, stopped at the intersection of 36th and Q Streets until the light turned green, let several vehicles go by, observed a motorcycle about a block away, activated his turn signal, and was making his turn when struck in the rear by plaintiff. Hoffman's investigation determined that the left-turn signal on the defendant's vehicle was operational.

Robert Scott, an accident reconstruction expert, testified that in his opinion plaintiff's motorcycle was traveling 52.8 miles per hour immediately prior to impact.

As a result of the accident, plaintiff Jessie Krug suffered bodily injury for which he was hospitalized, reasonably requiring medical expense of more than $7,000. He was permanently scarred and disabled, has undergone a personality change, and is presently unable to hold a steady job because of lack of concentration and drive.

It is obvious from the testimony that the accident was perceived differently by Krug, Driscoll, Laughlin, Laughlin's wife, and by Scott, all of whom were reasonable people drawing different conclusions.

At plaintiffs' rest and at the close of the case, defendant, in substance, moved alternative motions for directed verdicts — one, a motion for a directed verdict of dismissal of plaintiffs' causes of action for failure to prove a prima facie negligence; and two, for a directed verdict against the plaintiff Jessie Krug because of

negligence greater than slight by him when compared to the negligence by the defendant. The trial court overruled and denied both motions.

We affirm the verdicts and judgments thereon on the following principles.

A trial court should direct a verdict as a matter of law only when the facts are conceded, undisputed, or such that reasonable minds can draw but one conclusion therefrom. *Woodsmall v. Marijo, Inc.*, 206 Neb. 405, 293 N.W.2d 378 (1980); *Foremost Ins. Co. v. Allied Financial Services, Inc.*, 205 Neb. 153, 286 N.W.2d 740 (1980); *Stevens v. Kasik*, 201 Neb. 338, 267 N.W.2d 533 (1978); *Garcia v. Howard*, 200 Neb. 57, 262 N.W.2d 190 (1978); *McCready v. Al Eighmy Dodge*, 197 Neb. 684, 250 N.W.2d 640 (1977).

To test the evidence for a jury question, the trial court must resolve every controverted fact in favor of the party against whom a verdict is sought and give that party the benefit of every inference which can reasonably be drawn from the evidence presented. *Novotny v. McClintick*, 206 Neb. 99, 291 N.W.2d 252 (1980); *Foremost Ins. Co. v. Allied Financial Services, Inc., supra; Woodsmall v. Marijo, Inc., supra; Simet v. Sage, ante* p. 13, 301 N.W.2d 600 (1981).

Granting the plaintiffs every reasonable inference which can reasonably be drawn from the evidence presented above and resolving every controverted fact presented by the evidence in plaintiffs' favor, it is readily apparent that the plaintiffs established prima facie cases of negligence on the part of the defendant by showing that the defendant failed to yield the right-of-way to the motorcycle being driven by Jessie Krug, making a left-hand turn at the intersection when Krug's motorcycle was 3 or 4 feet from the intersection, in violation of Neb. Rev. Stat. § 39-636 (Reissue 1978), and by failing to keep a proper lookout by failing to see what he should have seen, to wit, the motorcycle 3 or 4 feet from the intersection at the time he executed his left-hand turning maneuver.

For purposes of a motion for a directed verdict, plaintiffs established prima facie cases of negligence against the defendant.

Using the same standards to test the evidence with regard to defendant's alternative motion, reasonable persons could differ as to whether plaintiff's negligence was greater than slight when compared with that of the defendant. The trial court was correct in overruling the alternative motion to direct the verdict and by submitting the matter to the jury pursuant to Neb. Rev. Stat. § 25-1151 (Reissue 1979), which provides in part: "In all actions brought to recover damages for injuries to a person or to his property . . . all questions of negligence . . . and contributory negligence shall be for the jury." Appellant makes no written or oral argument that the jury verdicts were excessive, but there is ample evidence in the record to support the award. A jury verdict will not be disturbed unless it is clearly erroneous and against the preponderance of the evidence. *Hayes v. Anderson Concrete Co., Inc.*, 186 Neb. 771, 186 N.W.2d 477 (1971); *Lintner v. Roos*, 202 Neb. 476, 276 N.W.2d 93 (1979); *Hartman v. Brady*, 201 Neb. 558, 270 N.W.2d 909 (1978).

Appellant complains in his brief that plaintiffs failed to establish prima facie proximate cause. No such issue was raised at trial or by the motion for new trial. We do not consider it here.

The jury verdicts and judgments thereon should be and are affirmed.

AFFIRMED.

KELLY, District Judge, concurs in result.

KNOELL CONSTRUCTION CO., INC., APPELLANT, V. JAMES A. HANSON ET AL., APPELLEES.

303 N.W.2d 314

Filed March 20, 1981. No. 43438.

1. **Judgments: Appeal and Error.** In the absence of a judgment or order finally disposing of a case, the Supreme Court has no authority nor jurisdiction to act, and in the absence of such judgment or order the appeal will be dismissed.
2. **Pleadings: Appeal and Error.** An order overruling a motion for leave to amend pleadings is interlocutory and not appealable.

Appeal from the District Court for Custer County: JAMES R. KELLY, Judge. Dismissed without prejudice.

Steven O. Stumpff of Stumpff & Washburn for appellant.

Carlos E. Schaper and John O. Sennett for appellees.

Heard before KRIVOSHA, C.J., MCCOWN, BRODKEY, and HASTINGS, JJ., and HICKMAN, District Judge.

MCCOWN, J.

This is the second appearance of this case in this court. In *Knoell Constr. Co., Inc. v. Hanson*, 205 Neb. 311, 287 N.W.2d 439 (1980), this court reversed a judgment for $11,267.50 in favor of the plaintiff and remanded the cause to the District Court for a new trial. The action was to foreclose a mechanic's lien grounded on land leveling work done on defendants' property. Plaintiff alleged an express contract as the basis for recovery. At the conclusion of plaintiff's evidence plaintiff requested leave to amend the petition to allege quantum meruit as the basis for recovery. Leave was granted over defendants' objection. Verdict and judgment for plaintiff followed. On appeal this court held that granting leave to amend the petition in that fashion at that stage of trial was erroneous and prejudicial and reversed the judgment and remanded the case for a new trial.

Upon return of the case to the District Court the

amendment of plaintiff's petition permitted at the former trial was stricken by the court. The plaintiff then orally moved for permission to amend its petition to allege quantum meruit as the basis for recovery rather than express contract. The District Court, apparently relying on *Hensley v. Chicago, St. P., M. & O. R. Co.*, 126 Neb. 579, 254 N.W. 426 (1934), rather than *Abbott v. Abbott*, 185 Neb. 177, 174 N.W.2d 335 (1970), determined that the tendered amendment would be barred by the statute of limitations and overruled plaintiff's motion. The court thereafter overruled plaintiff's motion for new trial and this appeal followed.

Neb. Rev. Stat § 25-1911 (Reissue 1979) provides for appeal only from "a judgment rendered or final order made." In the absence of a judgment or order finally disposing of a case, the Supreme Court has no authority nor jurisdiction to act, and in the absence of such judgment or order the appeal will be dismissed. *Wulf v. Farm Bureau Ins. Co.*, 188 Neb. 258, 196 N.W.2d 164 (1972).

An order overruling a motion for leave to amend pleadings is interlocutory and not appealable. *Troup v. Horbach*, 57 Neb. 644, 78 N.W. 286 (1899). See, also, *Wulf v. Farm Bureau Ins. Co., supra.*

The plaintiff's appeal is premature and is dismissed without prejudice.

DISMISSED WITHOUT PREJUDICE.

IN RE INTEREST OF TREMAYNE AND TERRELL CAMPBELL AND ALLEN REED, CHILDREN UNDER 18 YEARS OF AGE. STATE OF NEBRASKA, APPELLEE, V. ELLA LOUISE CAMPBELL, APPELLANT.

303 N.W.2d 513

Filed March 20, 1981. No. 43479.

1. **Parental Rights: Appeal and Error.** Proceedings involving the termination of parental rights are reviewed de novo in this court.

2. **Parental Rights.** Parental rights may be terminated where the record shows the parents have continuously and repeatedly neglected the children, have refused to give the children necessary parental care and protection, and such action is in the best interests of the children.

Appeal from the Separate Juvenile Court of Douglas County. Affirmed.

Spencer W. Dillon for appellant.

Donald L. Knowles, Douglas County Attorney, and Francis T. Belsky for appellee.

Heard before KRIVOSHA, C.J., BOSLAUGH, MCCOWN, CLINTON, BRODKEY, WHITE, and HASTINGS, JJ.

BOSLAUGH, J.

This is an appeal from an order of the separate juvenile court of Douglas County, Nebraska, terminating the parental rights of Ella Louise Campbell in Tremayne Campbell, born November 21, 1971; Terrell Campbell, born November 12, 1972; and Allen Reed, born April 22, 1975.

A petition alleging that the children were without proper support and care and that the defendant, Mrs. Campbell, was unable to provide support, care, and supervision was filed on July 25, 1979. On August 10, 1979, the juvenile court placed the children in foster care. An adjudication hearing was held on December 4, 1979, and parental rights were terminated on February 19, 1980. The defendant was present at the hearings and was represented by counsel. The children were represented by a guardian ad litem. Only the defendant has appealed.

Proceedings involving the termination of parental rights are reviewed de novo in this court. Parental rights may be terminated where the record shows the parents have continuously and repeatedly neglected the children, have refused to give the children necessary parental care and protection, and such action is in the best interests of the children. *In re Interest of Moen, ante* p. 337, 303 N.W.2d 303 (1981).

The evidence shows that the defendant is now 25 years of age. She suffers from paranoid schizophrenia characterized by auditory and visual hallucinations for which she has been hospitalized on occasion. She also suffers from "blackouts" which are unrelated to her paranoid schizophrenia. She has a history of drug abuse but refused to cooperate when her physician sought to determine the presence of drugs. A psychiatrist testified that she had been uncooperative with any level of treatment and he refused to express an opinion as to whether she could properly care for her children if she received treatment for schizophrenia.

The children suffered from poor hygiene and were not properly fed or clothed. They frequently suffered from colds, were physically dirty and unkempt, exuded body odors, and often smelled of urine. The youngest child frequented the residence of a neighbor who stated that the child was often hungry and dirty. Mrs. Campbell was absent from the home for extended periods, leaving the children totally unsupervised. She and the children moved frequently, causing the children to be absent from school most of the time.

The record shows by clear and convincing evidence that the children suffered from a lack of parental care, support, and supervision and the defendant was unable to provide proper care, support, and supervision for them. The order terminating the parental rights of the defendant is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. TONY PANKEY, APPELLANT.

303 N.W.2d 305

Filed March 20, 1981. No. 43597.

1. **Criminal Law: Effectiveness of Counsel.** Error or prejudice allegedly resulting from the ineffective assistance of counsel cannot be established where witnesses were not called, absent a showing in the record of the beneficial nature of such witnesses' testimony.
2. **Post Conviction: Proof.** In a post conviction proceeding the burden of proof is on the movant to establish a basis for relief, and where such burden is not met a denial of that requested relief is required.
3. **Criminal Law: Effectiveness of Counsel.** Where one maintains that counsel was inadequate, one must show how or in what manner the alleged inadequacy prejudiced him.

Appeal from the District Court for Douglas County: JAMES M. MURPHY, Judge. Affirmed.

Bruce G. Mason of Ross & Mason for appellant.

Paul L. Douglas, Attorney General, and Terry R. Schaaf for appellee.

Heard before KRIVOSHA, C.J., BOSLAUGH, MCCOWN, CLINTON, BRODKEY, WHITE, and HASTINGS, JJ.

KRIVOSHA, C.J.

The appellant, Tony Pankey (Pankey), appeals from an order entered by the District Court for Douglas County, Nebraska, denying Pankey's request for post conviction relief. We affirm.

This is the second appearance for this case. Originally this case was before us by reason of Pankey appealing his having been convicted by a jury of three counts of first degree sexual assault and one count of kidnapping. For the specific details of the case, see *State v. Pankey*, 202 Neb. 595, 276 N.W.2d 233 (1979).

Pankey now maintains that he is entitled to post conviction relief due to inadequate counsel. In particular, he maintains that his trial counsel inadequately represented him in that the trial counsel failed

to take the deposition of the two prosecutrixes prior to trial. The difficulty with the argument is that Pankey does not provide us with any evidence as to what the prosecutrixes would have testified to had their depositions been taken that would, in any manner, have been of benefit to Pankey and would have established how or in what manner he was denied adequate counsel. We have previously held that error or prejudice allegedly resulting from the ineffective assistance of counsel cannot be established where witnesses were not called, absent a showing in the record of the beneficial nature of such witnesses' testimony. See *State v. Holtan*, 205 Neb. 314, 287 N.W.2d 671 (1980). In a post conviction proceeding the burden of proof is on the movant to establish a basis for relief, and where such burden is not met a denial of that requested relief is required. *State v. Auger & Uitts*, 200 Neb. 53, 262 N.W.2d 187 (1978); *State v. Bartlett*, 199 Neb. 471, 259 N.W.2d 917 (1977). Where one maintains that counsel was inadequate, one must show how or in what manner the alleged inadequacy prejudiced him. *State v. Colgrove*, 207 Neb. 496, 299 N.W.2d 753 (1980); *State v. Harlan*, 205 Neb. 676, 289 N.W.2d 531 (1980). The record in this case discloses that there was more than sufficient evidence upon which the jury could determine, as it did, that the attacks were without consent and in violation of law. Absent any showing by Pankey as to what the testimony of the prosecutrixes would have been had their depositions been taken and how that testimony would have affected the outcome of the trial or established that Pankey was inadequately represented, he has simply failed to meet his burden. The judgment of the trial court must, therefore, be affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. JOHN R. ELLIS, APPELLANT.

303 N.W.2d 741

Filed March 27, 1981. No. 42954.

1. **Venue.** Questions of venue may be established by circumstantial evidence as well as direct evidence.
2. **Homicide: Circumstantial Evidence: Jury Instructions.** Ordinarily, in a case charging first degree murder, where there is no eyewitness to the act, and the evidence is largely circumstantial, the jury should be instructed as to the law governing murder in the first degree, second degree, and manslaughter.
3. **Criminal Law: Rules of Evidence.** The "other-crimes" rule, Neb. Rev. Stat. § 27-404(2) (Reissue 1979), is a rule of relevance and such evidence is ordinarily prejudicial because prior criminal activity is irrelevant to the proof of a specific crime.
4. **Criminal Law: Evidence: Proof.** It is competent for the prosecution to put in evidence all relevant facts and circumstances which tend to establish any of the constituent elements of the crime with which the accused is charged, even though such facts and circumstances may prove or tend to prove that the defendant committed other crimes.
5. **Criminal Law: Pleas: Evidence.** A not guilty plea places in issue every relevant fact, and the prosecution should not be precluded from introducing evidence on a certain element of the alleged crime because there was already some other evidence in the case tending to establish the same, until and unless the trial court, in the exercise of its discretion, determines that further evidence on that point is irrelevant.
6. **Criminal Law: Evidence.** A purported showing of a paucity of evidence does not prove that a trial court abused its discretion in balancing the probative value against the prejudicial effect of a particular item of disputed evidence. In fact, a lack of other relevant evidence may in some instances increase the probative value of the evidence available.
7. ____: ____. The admissibility of evidence of other crimes lies largely within the discretion of the trial court.
8. ____: ____. Evidence of other crimes, if relevant to the issue, is not made inadmissible simply because they occurred at a time after that of the principal charge.
9. **Juror Qualifications.** Qualified jurors need not be totally ignorant of the facts and issues involved. It is sufficient as to competency to serve if the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court.
10. **Witnesses: Self-Incrimination.** It is not error for a trial court to limit cross-examination of a witness concerning a subject wherein the witness has claimed the privilege against self-incrimination.

11. **Petit Larceny: Impeachment.** The crime of petit larceny without proof that the manner in which it was accomplished involved deceit or deception so as to be classified as "crimen falsi" is not such a crime as may be used to impeach a witness' veracity under Neb. Rev. Stat. § 27-609 (Reissue 1979).
12. **Prosecutorial Misconduct.** Whether misconduct on the part of a prosecuting attorney is prejudicial to the defendant depends largely upon the facts of each particular case.
13. **Indictments and Informations: Jury Verdicts.** It is only where there is a total failure of competent proof in a criminal case to support a material allegation in the information, or where the testimony adduced is of so weak or doubtful a character that a conviction based thereon could not be sustained, that the trial court will be justified in directing a verdict of not guilty.

Appeal from the District Court for Lancaster County: WILLIAM D. BLUE, Judge. Affirmed.

Robert B. Creager of Berry, Anderson & Creager for appellant.

Paul L. Douglas, Attorney General, and Sharon M. Lindgren for appellee.

Heard before KRIVOSHA, C.J., BOSLAUGH, MCCOWN, CLINTON, BRODKEY, WHITE, and HASTINGS, JJ.

PER CURIAM.

John R. Ellis appeals to this court from his conviction by the jury of the manslaughter of Deborah A. Forycki. He alleges as principal grounds for reversal: (1) That the Lancaster County District Court lacked jurisdiction to try the action because of improper venue; (2) That the court erred in submitting the case to the jury on the charges of first and second degree murder; (3) That the trial court erred in admitting evidence of other crimes, wrongs, or bad acts committed by him; (4) That the court erred in failing to strike a prospective juror for cause; (5) That it was error to limit his cross-examination of certain witnesses; (6) That error was committed by the admission of purported hearsay testimony; (7) That the trial court erred in failing to grant a mistrial based on the claim of prosecutorial

misconduct; and, finally, (8) That the court erred in overruling defendant's motions to dismiss and for a directed verdict. We affirm the District Court.

We first review the facts of this case as revealed by the record, recognizing that most of the evidence adduced was circumstantial in nature. The record is undisputed that Forycki was last seen on October 3, 1974, in Lancaster County, Nebraska, and that her skeletal remains were found in Cass County, Nebraska, on September 13, 1978. At the time of her disappearance, Forycki was a senior at the University of Nebraska-Lincoln, who worked part time at a downtown Lincoln store. On the date of her disappearance, Forycki was to meet a friend for lunch around 11:30 and then be at her place of employment at around 1 o'clock. She was observed leaving her apartment around 11 o'clock that morning, walking toward the downtown area as was her custom, because she did not own or have access to an automobile. She failed to keep her luncheon engagement that day and was never seen or heard from again.

As was previously mentioned, her remains were discovered in Cass County, Nebraska, on September 13, 1978. The skeleton was found inside an antique water wagon which was being prepared for restoration. The water tank atop the wagon's running gear was approximately 10 feet long by 3 feet wide, having a covered top, the opening therein being roughly 2 feet by 2½ feet. The skeleton was found beneath three logs, 5 feet long and 4 inches in diameter, which were apparently sawed at the ends. Atop these logs were two to three sticks, 4 inches in diameter, and an undetermined number of other sticks 2 inches in diameter. Wedged tightly in the opening of the water tank was a roll of woven wire fencing. The water tank had several holes in its sides which were identified as bullet holes, although the date of the making of such holes and the caliber of weapons involved were not definitely determined.

The skeleton was removed from the water tank by an anthropologist using standard techniques. Before

removal, the skeleton was observed to be in roughly anatomical position, lying on its back; the feet extended and together; left arm along the left side, with the left hand where the hip would be; right arm pulled up, with the right hand, facing palm up, where the right ear would be; head slightly turned to the right. The skull was located approximately 1½ feet from the end of the water tank, the abdominal section of the skeleton being located beneath the opening in the top of the water tank. The skeleton showed no signs of trauma or force applied to fracture the bones, with the following exception: The right thumb bone and the right radius at the wrist end had apparent defects.

The cause of the defects was undetermined. A forensic scientist who examined the bones believed the defects were consistent with having been formed by a bullet. The anthropologist was of the opinion that the defects were not caused by a bullet. Notwithstanding the dispute as to the cause of defects, the county coroner's physician testified that a wound to the wrist or finger was usually not mortal.

No jewelry, fasteners, zippers, clasps, buckles, or shoes were found in the water tank. A lead object, which exhibited characteristics of a .22-caliber bullet from a rimfire cartridge, was found beneath the skeleton in the abdominal area where the left kidney would have been had the body not been decomposed. While no cause of death could specifically be established by any witness, the county coroner's physician was allowed to testify, over objection, that the skeleton did not show any evidence of fractures, tumors, or healed fractures; of death from natural disease processes; or of death from an accident caused by force applied to bones to fracture them. However, he could not make a determination of the specific and immediate cause of death from an examination of the skeleton.

Evidence with regard to whether Forycki might have committed suicide was also introduced. Following a description of the observable characteristics which a

person with suicidal intent or tendencies exhibits, a psychiatrist, whose specialty was in the area of depression and manic-depressive illnesses, testified that he did not believe Forycki was suicidal at the time of her disappearance. This opinion was in answer to a hypothetical question which ostensibly included the observations of her roommate, friends, family, and acquaintances with regard to Forycki's demeanor prior to her disappearance. He further examined a writing made by Forycki on October 2, 1974, from which he said "describes the young lady who although is having transient problems is functioning in my estimation normally."

A second psychiatrist disagreed with the above-mentioned witness in certain respects. He acknowledged, after reading a transcript of the first psychiatrist's testimony, that the characteristics described by the latter were classical symptoms of a *type* of depression. However, he testified such characteristics were not commonly found in younger people, and, further, there are other types of depression. Moreover, he was of the opinion that Forycki *could* have committed suicide, noting that a person would not write a note similar to that written by Forycki on October 2, 1974, unless the person was upset. He further stated that Forycki was certainly depressed.

In addition to the foregoing, the State presented evidence to establish a connection between Ellis and Forycki. Business records with regard to the class schedules of Ellis and Forycki at the University of Nebraska-Lincoln were introduced. The records revealed that Ellis and Forycki had classes which apparently met the same 3 days a week on the same floor of the same building at the same time of day in the spring of 1974. Testimony from a police officer who investigated the building in 1978 indicated that the numbered classrooms which corresponded to those wherein Ellis and Forycki had classes in 1974 were 60 to 70 feet apart. Class schedules covering the fall of 1974

indicate that Forycki and Ellis had classes 3 days a week in the same building at the same time of the day, although on different floors of the building.

Ellis was enrolled in a class which met on Tuesday and Thursday afternoons during the fall of 1974. His instructor for that class testified that, although she had no independent recollection of the day, Ellis was absent from class on the first Thursday in October, which was October 3rd, according to her records.

A short time after her disappearance on October 3, 1974, a police officer found a note while examining Forycki's possessions. The note, which was subsequently misplaced by the police so that its whereabouts were unknown at the time of trial, was undated. The police officer testified, over objection, that the contents of the note were as follows: "Meet John Kondowski 10:30 at the Student Union." Subsequent investigation failed to reveal the existence of any person by that name in Lincoln.

In October of 1974, Ellis met a woman who was attending the University of Nebraska-Lincoln, with whom he used the alias of "John Tronzowski." A search of university records and of directories of the area failed to reveal a person by either the name of "Kondowski" or "Tronzowski." The woman appeared at trial and testified, over objection, as to the details of a breakfast date which she had with Ellis on October 17, 1974. According to her, when she met him that particular morning, he had a piece of rope trailing from his jacket pocket, which he explained as being used for some class that he was taking. Ellis was rather vague as to where they were going, only saying that a friend had given him permission to use his house where they could cook ham and eggs. It was, in fact, a house rented by Ellis. During the early part of their stay at this house, Ellis brought out some apples which he was cutting with a large knife. He made some advances toward this young woman, which she resisted, and he then grabbed her arm with one hand and the knife with the other,

which he held near the level of her throat. He then stuffed a handkerchief in her mouth which she wiggled free, and he then told her to get down on the floor, and threatened to break her arm if she screamed. However, she did scream and became hysterical, and finally was able to leave the house. The police were informed of the incident, but charges were not filed.

The testimony of another witness with reference to her experience with Ellis in 1976, approximately 2 years after Forycki's disappearance, was adduced. This witness testified, over defendant's objection, that in the later afternoon of June 10 she received a telephone call from Ellis making a date with her for that evening to eat at a certain restaurant located on East O Street in Lincoln. He at first suggested that she meet him there in the parking lot, but she insisted that he pick her up at her residence. He then called a second time and arranged for her to meet him at the sidewalk in front of her residence. She then got into his automobile. She was not certain whether it was at that time or during the second phone call that he told her they were going to a barbecue at a friend's house out in the country near Elmwood, instead of to the restaurant.

After turning off the main highway south of Elmwood, Ellis all of a sudden turned into a farm road which was screened on either side by high weeds and trees. Shortly after they stopped, the witness saw or felt a knife at her neck, and Ellis then grabbed the top of her hair and pulled it tightly and tried to grab her left arm and pull it behind her. She managed to struggle free and grabbed the blade of the knife. After some calmer discussion between them, the knife was dropped outside the car. The witness then suggested going into Elmwood, which apparently enraged Ellis, who again grabbed the top of her hair, clutched her arm, and forced it behind her neck. He pushed her down on her knees to the floor of the car and tied her arms behind her back. He then tried to place masking tape over her mouth, but she commenced to scream. This seemed to

cause a change in attitude in Ellis, and he freed her bonds, and they drove to Elmwood where the witness was able to leave Ellis' car.

The assault on this witness occurred within 75 feet of the location of the water wagon containing the remains of Forycki. Charges were filed against Ellis, and he was convicted and sentenced to jail time in Cass County for this assault.

The location of the antique water wagon was approximately 20 miles from Lincoln. Ellis did not own an automobile in 1974. However, his wife, whom he married on June 6, 1974, owned an automobile that he had access to and use of. Subsequent investigation of the automobile revealed the presence of certain hairs which, according to the testimony of an expert witness, exhibited the same characteristics as that of Forycki's. There was testimony, however, that the hairs might also have come from the daughter of Ellis' wife from a prior marriage who had access to the automobile.

Further evidence with reference to Ellis' familiarity of the Elmwood area was adduced. A cellmate of Ellis' during his incarceration for the 1976 assault testified that Ellis stated that the people in Elmwood were really stupid; and that "if you ever killed somebody and wanted to hide the body, that would be a really good place to do it, that the police would never find it." Ellis further allegedly stated to this witness that he had found a secluded place outside Elmwood to which he had taken people from college on occasions.

Finally, evidence was adduced with reference to statements made by Ellis during an interrogation just prior to his arrest in Evanston, Illinois, for the homicide. The police officers testified that initially Ellis was told that they wanted to talk to him about the death of Deborah Ann Forycki, and he replied that he would like to meditate. A period of meditation of approximately 20 minutes passed, and he was again asked about her death, this time specifically as to whether he, Ellis, was present when she died. His reply, according

to the testimony, was that he could not do anything that brutal. This statement was made even though no details regarding the finding of her skeleton were made known to Ellis at the time. Another officer who interviewed Ellis separately testified that he had accused the defendant three times of causing the death of Deborah Forycki and the first two times no response was noted. The third time Ellis replied that "he had put that part of his life out of his mind."

One of the officers testified that Ellis, when told that the police knew that he had been involved in offenses against young women, and specifically the incidents involving the two female witnesses previously mentioned, replied that he was "beginning a new life in Evanston and that was a part of his life that he was putting out of his mind and would not remember that portion of his life." He was then asked, according to the officer, if he had killed anyone, could he put that out of his mind; and he replied, "I think so."

Ellis did not testify in his own behalf at trial. However, evidence with regard to Forycki's emotional state prior to her disappearance was adduced. An instructor of a class which she had in the fall of 1974 and a friend both testified that Forycki had exhibited a marked change in attitude within the week before her disappearance. The friend further testified that Forycki had been depressed for much of September 1974. Finally, an acquaintance of Forycki testified that she had seen Forycki between 12 o'clock and 12:30 p.m. on October 3, 1974, in a downtown Lincoln store. However, rebuttal evidence indicated that the witness might have seen Forycki on October 2, 1974, the day prior to her disappearance.

The jury was instructed on the crimes of first degree murder, second degree murder, and manslaughter. Following deliberation, the jury returned a verdict finding Ellis guilty of manslaughter. The court sentenced Ellis to a term of imprisonment of 10 years. Ellis has appealed to this court, assigning various errors to the trial

proceedings, as were earlier set forth.

We first discuss Ellis' contention that the court lacked jurisdiction to try the case because of improper venue of the crime, and that the proper venue should have been in Cass County where the body was found. In *Hawkins v. State*, 60 Neb. 380, 83 N.W. 198 (1900), this court held that in a prosecution for murder, evidence of the finding of the body of the person alleged to have been murdered, in an old well which had been subsequently filled, situated in Frontier County, was sufficient, *in the absence of other proof*, to warrant the jury in concluding the homicide was committed in that county. That case, however, was decided prior to our current statute with reference to venue in criminal cases. Our Legislature has provided that all criminal cases shall be tried in the county where the offense was committed, with certain exceptions, one of which is: "If any person shall commit an offense against the person of another, such accused person may be tried in the county in which the offense is committed, or in any county into or out of which the person upon whom the offense was committed may, in the prosecution of the offense, have been brought, or in which an act is done by the accused in instigating, procuring, promoting, or aiding in the commission of the offense, or in aiding, abetting, or procuring another to commit such offense." Neb. Rev. Stat. § 29-1301.01 (Reissue 1979).

The evidence is clear from the record that Forycki left her home in Lincoln on the morning of October 3, 1974, with every intention of returning that evening. She had a luncheon engagement with another person, which she failed to keep, contrary to her stated plans and inherent characteristics and habits of being prompt, reliable, and, as testified to, always early for her appointments. Her body was found in a secluded area in Cass County of which she apparently had no knowledge. In addition, she had no automobile or means of transportation of her own, and it is therefore fairly inferable that she was taken from Lincoln to Cass

County by someone. In addition, it is clear from the evidence that when her body was found in the water wagon there was no clothing, jewelry, or articles of adornment found in the water wagon with her remains. This lack of clothing, considered in connection with her reputation for promptness and her clear intention of returning to her home that evening, would permit the conclusion that Forycki was taken from Lincoln to Cass County for criminal purposes by someone, and the trial court so found. It has long been the established rule in this state that questions of venue may be established by circumstantial evidence as well as direct evidence. See, *Clark v. State*, 151 Neb. 348, 37 N.W.2d 601 (1949); *State v. Laflin*, 201 Neb. 824, 272 N.W.2d 376 (1978). While there was no direct evidence that Ellis transported Forycki to Cass County on that date, there is evidence that he was absent from class on that date and, also, that hairs were found in the automobile used by him which exhibited the same characteristics as hairs taken from Forycki. We therefore believe that there was ample evidence sustaining the action of the court in refusing to dismiss the action on grounds of venue.

Ellis also contends that the court erred in submitting the case to the jury on charges of first and second degree murder. He does not assign as error the court's instruction with reference to the crime of manslaughter. We believe the court was proper in submitting all three degrees of homicide for the determination of the jury. In *Bourne v. State*, 116 Neb. 141, 216 N.W. 173 (1927), we held that, ordinarily, in a case charging first degree murder, where there is no eyewitness to the act, and the evidence is largely circumstantial, the jury should be instructed as to the law governing murder in the first degree, second degree, and manslaughter. Likewise, in *Moore v. State*, 148 Neb. 747, 29 N.W.2d 366 (1947), we held that where an information charges the crime of murder in the first degree, murder in the second degree and manslaughter are included in the charge, the degree ordinarily being for the jury, and where the

evidence and circumstances of the killing are such that different inferences may properly be drawn therefrom as to the degrees, it becomes the duty of the court to submit the different degrees to the jury for them to draw the inferences. See, also, *Vanderheiden v. State*, 156 Neb. 735, 57 N.W.2d 761 (1953); *State v. Marion*, 174 Neb. 698, 119 N.W.2d 164 (1963); *Kraus v. State*, 102 Neb. 690, 169 N.W. 3 (1918). In view of the fact that in this case there were no eyewitnesses to the death of Forycki, and that the evidence adduced was largely circumstantial, the court was correct in instructing the jury as to the law governing murder in the first degree, second degree, and manslaughter.

Ellis principally contends that the trial court comitted error in admitting evidence of other crimes, wrongs, or bad acts committed by him. The statutory rule with regard to admissibility of such evidence is: "Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." Neb. Rev. Stat. § 27-404(2) (Reissue 1979).

The evidence of which the defendant complains, of course, is that of the two assaults as reflected by the testimony of the two young women, earlier set forth in some detail in this opinion. The evidence was introduced, it would seem, to prove the identity of the assailant of Miss Forycki, knowledge by the defendant of the secluded area where the victim's body was found, and plan or scheme or modus operandi.

"The 'other-crimes' rule is a rule of relevance and such evidence is ordinarily prejudicial because prior criminal activity is irrelevant to the proof of the commission of a specific crime. Where such evidence, however, is in fact relevant the 'other-crimes' rule does not apply. As recently as in State v. Knecht, 181 Neb. 149, 147 N.W.2d 167, we stated the rule as follows: 'The

defendant cites cases holding that a mistrial should be granted where evidence of other crimes is brought into the record. It is not necessary to discuss these cases here. It is competent for the prosecution to put in evidence all relevant facts and circumstances which tend to establish any of the constituent elements of the crime with which the accused is charged even though such facts and circumstances may prove or tend to prove that the defendant committed other crimes.'" *State v. Riley*, 182 Neb. 300, 305, 154 N.W.2d 741, 744 (1967). See, also, *State v. Nielsen*, 203 Neb. 847, 280 N.W.2d 904 (1979). And it is no answer for the defendant to claim that the evidence as to knowledge of the location was unnecessary because the witness Burns had already testified that Ellis had knowledge of the area. This fact should not and does not foreclose the State's introduction of additional evidence on a disputed question of fact. It is elementary that a plea of not guilty places in issue every relevant fact to prove the State's case, and until and unless the trial court, in the exercise of its discretion, determines that further evidence on a point is irrelevant, the State is entitled to attempt to prove its case.

As stated in *People v. Condon*, 26 N.Y.2d 139, 142, 257 N.E.2d 615, 616, 309 N.Y.S.2d 152 (1970): "[S]o long as the evidence adduced as to the Suffolk County crime was relevant on the issue of identity, the People should not have been precluded from introducing evidence of that crime merely because there was some other evidence in the case tending to establish the identity of the defendant."

This court does not require that the prior or subsequent activity be identical to the act charged to be admissible. As stated by the Eighth Circuit Court of Appeals: "It is enough that the evidence be of similar involvement reasonably related to the offending conduct and be presented in a manner in which prejudice does not outweigh its probative value." *United States v. Gocke*, 507 F.2d 820, 825 (8th Cir. 1974). Section

27-404(2) is identical to Fed. R. Evid. 404(b). The advisory committee's note to that rule states: "The determination must be made whether the danger of undue prejudice outweighs the probative value of the evidence, in view of the availability of other means of proof and other factors appropriate for making decisions of this kind under Rule 403." *Id.* at 92.

The trial court must balance between the danger of unfair prejudice to the defendant and the probative value of that evidence. It is for this court to determine whether the trial court abused its discretion, taking into consideration all factors and other means of proof. The defendant contends that the admission of the two independent assaults was prejudicial because of an alleged lack of other reliable evidence of the defendant's guilt.

"[A] purported showing of a paucity of evidence does not prove that trial court abused its discretion in balancing the probative value against prejudicial effect of a particular item of disputed evidence. . . . In fact, a lack of other relevant evidence may in some instances increase the probative value of the evidence available. [Citations omitted.]" *State v. Cott*, 283 N.W.2d 324, 329 (Iowa 1979). All factors must be put in the balance, and the trial court has a large amount of discretion in this regard.

This court has consistently stated the rule that the admissibility of evidence of other crimes lies within the discretion of the trial court. *State v. Costello*, 199 Neb. 43, 256 N.W.2d 97 (1977); *State v. Moore*, 197 Neb. 294, 249 N.W.2d 200 (1976); *State v. Ray*, 191 Neb. 702, 217 N.W.2d 176 (1974).

"The extent to which the discretion of the trial court will be allowed to be exercised in this regard has not been fixed by any decision of this court. Probably it cannot be but depends upon the facts in each case. . . . In State v. Siddoway, 61 Utah 189, 211 P. 968, it was held: 'No exact limitation of time can be fixed as to when another offense tending to prove the intent of the act

charged is remote. The decision of that question must depend upon the circumstances of the particular case, and whether evidence is too remote or not is a question whose decision is largely in the sound discretion of the trial court.' [Citations omitted.] The doctrine generally accepted is that remoteness in point of time may weaken the evidential value of the evidence but does not justify its exclusion. [Citations omitted.]

"Likewise it is a matter left to the discretion of the trial court as to whether the prior offenses are sufficiently similar to the one charged in the case on trial so that evidence thereof has probative value." Sall v. State, 157 Neb. 688, 697-98, 61 N.W.2d 256, 262 (1953). (Emphasis supplied.)

It cannot seriously be contended that the other offenses must have preceded the principal charge as to time of occurrence. *The State v. King,* 111 Kan. 140, 206 P. 883 (1922). Likewise, there is no magic in the amount of time by which the other offenses must have preceded or followed the case being tried, e.g., a period of 15 months did not affect the relevancy of the evidence. *Umbaugh v. Hutto,* 486 F.2d 904 (8th Cir. 1973).

We are well aware of the responsibility which falls upon the shoulders of the judicial system to protect the rights of a defendant in excluding evidence whose probative value is far outweighed by its unfair prejudice. However, it is no answer for us to stick our heads in the sands of caution and exclude all evidence of other crimes because of the mere possibility of prejudice. After all, any evidence offered by the prosecution in a criminal case is assumed to be prejudicial, otherwise it would not be offered. Nevertheless, as stated in 70 Yale L.J. 763, 773 (1961): "[W]here the highly prejudicial evidence also has great probative worth and plays a crucial role in the prosecutor's case, exclusion of the evidence may destroy his case and result in an unjustified acquittal." In this instance, we cannot say that the trial court abused its discretion when it determined that the probative value of the evidence of other crimes

in the facts and circumstances of this case was not outweighed by the prejudicial effect. The evidence was properly received.

A juror by the name of Wilson was called as a member of the panel to constitute the jury in this case. Mr. Wilson was at the time of the trial a member of the Lincoln Police Department, and had been for approximately 5 years. He was acquainted with many of the officers who would be testifying and had heard the case discussed to some extent within the department, but had not done any work on it himself. He did state, in answer to questions on voir dire, that it was his opinion that Miss Forycki was murdered, but that he did not have any opinion as to whether or not John Ellis was the one responsible for that murder. Finally, the juror stated that if instructed to do so, he could set aside any opinions about the case that he held at that time. The defendant's challenge for cause was overruled. However, Mr. Wilson was not one of the jurors who was retained on the jury which actually heard the trial.

Neb. Rev. Stat. § 29-2006 (Reissue 1979) provides that it is a good cause for challenge of a juror who has "formed or expressed an opinion as to the *guilt* or innocence *of the accused* . . . ." (Emphasis supplied.) However, the statute goes on to provide that if the juror states under oath that notwithstanding such opinion he can render an impartial verdict, the court may in its discretion "admit such juror . . . as competent to serve in such case." The defendant in his brief concedes that "[t]he granting of a challenge of a prospective juror for cause is within the discretion of the trial court, and is generally not reversed unless clearly wrong." This position is supported by *Bemis v. City of Omaha*, 81 Neb. 352, 116 N.W. 31 (1908); *Ward v. State*, 58 Neb. 719, 79 N.W. 725 (1899); and *Kitts v. State*, 153 Neb. 784, 46 N.W.2d 158 (1951). In *Murphy v. Florida*, 421 U.S. 794, 799-800, 95 S. Ct. 2031, 44 L. Ed. 2d 589 (1975), the Court said: "Qualified jurors need not, however, be totally ignorant of the facts and issues involved.

'To hold that the mere existence of any preconceived notion as to the guilt or innocence of an accused, without more, is sufficient to rebut the presumption of a prospective juror's impartiality would be to establish an impossible standard. It is sufficient if the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court.' [Citations omitted.]" There is no merit to defendant's complaint.

Defendant also contends that he was unduly restricted in his cross-examination of the witness who testified about being assaulted by the defendant in the Elmwood area. The defendants' counsel attempted to cross-examine her on relationships with Ellis, including past sexual conduct. At the time to be covered in such cross-examination, the witness was married to another man. She claimed her privilege against self-incrimination and public ignominy, and the trial court sustained the objection. This ruling was fully in accord with Neb. Rev. Stat. § 25-1210 (Reissue 1979) which states in part: "When the matter sought to be elicited would tend to render the witness criminally liable, or to expose him to public ignominy, he is not compelled to answer . . . ."

The defendant also complains that the trial court prohibited the defendant from inquiring of the witness Burns as to a prior petit larceny conviction as constituting an act of dishonesty within the meaning of Neb. Rev. Stat. § 27-609 (Reissue 1979). He also claims that he was not permitted to inquire as to the different times that Burns had been in jail before the incident involving the conversation with Ellis about which he testified. The answer to the second contention is that, in the final analysis, the trial court did not direct the defendant's attorney not to make such inquiry, but the defendant chose not to cross-examine Burns in that regard. The other problem, whether the crime of petit larceny is one involving "dishonesty or false statement" within the meaning of § 27-609, cannot be disposed of in such a summary fashion.

At first blush, it might appear that to steal is to be dis-

honest; therefore, larceny is a crime involving dishonesty. However, that conclusion does not necessarily follow. The specific language of § 27-609 was taken from Fed. R. Evid. 609, 28 U.S.C. at 563 (1976). Referring to Notes of Conference Committee, House Report No. 93-1597, we find this language at 565: "By the phrase 'dishonesty and false statement' the Conference means crimes such as perjury or subornation of perjury, false statement, criminal fraud, embezzlement, or false pretense, or any other offense in the nature of crimen falsi, the commission of which involves some element of deceit, untruthfulness, or falsification bearing on the accused's propensity to testify honestly." That report was discussed in *United States v. Smith*, 551 F.2d 348 (D.C. Cir. 1976), and the term "crimen falsi" was defined at 362-63: "Even in its broadest sense, the term 'crimen falsi' has encompassed only those crimes characterized by an element of deceit or deliberate interference with a court's ascertainment of truth." The court then goes on to say at 363-64: "Two recent Third Circuit cases, decided the same day, have argued convincingly that petty larceny is not ordinarily a crime involving dishonesty or false statement under Rule 609(a)(1)."

One of the two cases referred to was *Government of Virgin Islands v. Toto*, 529 F.2d 278 (3d Cir. 1976). At page 281 of that opinion appears the following: "For our purposes here, we have no difficulty in accepting the government's formulation of the concept: 'Although the term "Crimen Falsi" has been subject to many definitions, the generally accepted scope of the term would be crimes that are in the nature of perjury or subornation of perjury, false statement, criminal fraud, embezzlement, false pretense or any other offense the commission of which involves some element of deceitfulness, untruthfulness, or falsification bearing on the accused's propensity to testify truthfully.' Appellee's Brief at 4. Absent special circumstances, and as the district court so aptly put it: *'Petit larceny is just not that.'*"

(Emphasis supplied.) See, also, footnote 3: "It is conceivable that a conviction for petit larceny might subsume a crime in the nature of *crimen falsi*, e.g., 'petit' stealing by false pretenses. There is no indication that the petit larceny involved here was other than ordinary stealing. If appellant's prior conviction was for petit larceny which might be classified as *crimen falsi*, it will be incumbent upon the prosecution to bring that point to the trial court's attention if evidence of the conviction is sought to be introduced on retrial."

Although the statements set out above were dictum in that case, we agree with the reasoning of the court. The defendant, in his offer of proof, having failed to show that the petit larceny offense of which the witness had been convicted involved deceit or deception so as to be classified as "crimen falsi," the District Court was correct in prohibiting its introduction into evidence.

The defendant insists that the testimony of the two witnesses who testified as to the contents of a note containing the name of "John Kondowski," found among Miss Forycki's possessions, should have been excluded as hearsay. Neb. Rev. Stat. § 27-1004 (Reissue 1979) provides in part: "The original is not required, and other evidence of the contents of a writing . . . is admissible if: (1) All originals are lost or have been destroyed, unless the proponent lost or destroyed them in bad faith . . . ." The record supports the admission of the testimony under the authority of that section. However, the defendant urges us to find that note itself constituted hearsay because it was claimed to have been written by Miss Forycki. However, the testimony was not offered to prove the truth of any statement made by the victim, but, rather, that the name "John Kondowski" appeared on a piece of paper in Miss Forycki's handwriting. The evidence of the writing itself supported a logical inference that the two were acquainted and was not hearsay.

We next turn to defendant's complaint of misconduct on the part of the prosecuting attorney in asking certain

questions and in comments made during final summation. We should observe at the outset that this was a very long, complicated, and hard-fought trial, filled with innumerable objections by defense counsel in conscientiously defending his client, which in turn spawned increasingly aggressive questioning by the prosecutor in performing his lawful duties. For example, in the final closing, the county attorney stated that the defense had made him prove every detail of the crime. Defendant urges that this is tantamount to saying that guilt can be inferred because the defense required the State to prove its case, which he insists is an overzealous misstatement of the law. It was that, and it was perhaps a bit unartful. "Although the prosecutor was less than artful at times, it does not appear that his conduct was meant to, or did, inflame the prejudices or excite the passions of the jury against the defendant." *State v. Tiff*, 199 Neb. 519, 529, 260 N.W.2d 296, 302 (1977). Also, one must look to the prior remarks of defense counsel in closing, during which he inquired of the jury, in effect, why did the prosecutor spend so much time in proving the identity of the victim, in proving that she did not die of self-inflicted wounds or of natural causes. One cannot leave questions dangling and then object because answers are attempted. The prosecutor's laudatory remarks about the quality of the investigational work done by the Lincoln Police Department were quite irrelevant, but hardly rise to the level of inflammatory remarks tending to prejudice the jury. The other questions or remarks simply consisted of logical inferences that could be deduced from the record, even though not directly supported by specific evidence. We have examined the record carefully in this regard, and conclude that the remarks complained of did not rise to a level sufficient to have required the granting of defendant's motion for a mistrial. "Whether misconduct on the part of a prosecuting attorney is prejudicial to the defendant depends largely upon the facts of each particular case." *State*

v. Costello, 199 Neb. 43, 53, 256 N.W.2d 97, 104 (1977).

Finally, we must examine the defendant's claim that the evidence did not support the jury's verdict and that the court erred in failing to sustain his motion to dismiss or for a directed verdict. The trial court gave as its instruction No. 13, NJI 14.50, concerning circumstantial evidence. We have held that "the law is well settled that a person charged with a crime may be convicted on circumstantial evidence only" but "that if circumstantial evidence is used to convict a defendant in a criminal case, it must be of such weight and character as to establish proof of guilt beyond a reasonable doubt." *State v. Payne*, 205 Neb. 522, 531, 534, 289 N.W.2d 173, 178, 179 (1980).

We have set forth the relevant evidence earlier in this opinion. The following language from *State v. Williams*, 205 Neb. 56, 72-73, 287 N.W.2d 18, 27-28 (1979), is particularly appropriate here: "For almost a century it has been the rule in this state that: 'It is only where there is a total failure of competent proof in a criminal case to support a material allegation in the information, or where the testimony adduced is of so weak or doubtful a character that a conviction based thereon could not be sustained, that the trial court will be justified in directing a verdict of not guilty.' [Citation omitted.]

"While the evidence in this case may be entirely circumstantial . . . there can be no real doubt that it was more than sufficient to go to the jury, and the trial court did not err in overruling the motion for directed verdict."

The defendant's various assignments of error are not sustainable. The judgment and sentence of the District Court are affirmed.

AFFIRMED.

KRIVOSHA, C.J., dissenting.

I must respectfully dissent from the majority in this case. I believe that the majority's conclusions are in error, both with regard to venue properly lying in

Lancaster County and concerning the admissibility of the testimony of two female witnesses involving subsequent acts with the defendant Ellis.

There is no question but that the death of Deborah A. Forycki was tragic and that the perpetrator of the horrible crime must be apprehended and convicted. The tragedy of the death, however, should not cause us to ignore basic rules of evidence in criminal cases. It is because of a case exactly like the instant case that we have developed strict rules of evidence which must be followed in a criminal case.

In the instant case, if the evidence establishes anything, it establishes that the appellant was not guilty of manslaughter, as found by the jury. There is simply no evidence, direct or circumstantial, to establish that the appellant killed Ms. Forycki either upon a sudden quarrel or while in the commission of an unlawful act, either of which element is necessary to establish the crime of manslaughter. Neb. Rev. Stat. § 28-305 (Reissue 1979). The verdict was obviously a compromise verdict and displays the difficulty which the jury obviously had in reaching a conclusion and the prejudice which the testimony of the State's two key witnesses must have created.

I turn first to the matter of venue. As noted by the majority, the trial of a criminal case is to be held in the county in which the crime was committed. Neb. Rev. Stat. § 29-1301 (Reissue 1979). We have, however, by statute, created an exception to the general rule. Neb. Rev. Stat. § 29-1301.01 (Reissue 1979) provides that if a person takes another from one county to another county for the purpose of committing a criminal act, the individual may be tried in the county from which the victim was initially taken. The difficulty with applying that statute to this case, however, is that there is no evidence, either direct or circumstantial, that the accused took the victim from Lancaster County to Cass County. The majority argues that the evidence clearly establishes that the victim did not own an automobile or have any other means of transportation and,

therefore, the only way in which the victim's remains could have been found in Cass County is if the accused took her to Cass County. The evidence, however, shows that the accused did not own an automobile. It is true that he had access to an automobile. Yet, there is no evidence in the record that on the day of Ms. Forycki's disappearance he had in fact exercised that right and had the vehicle in his possession.

But even assuming for the moment that one may infer that the accused took the victim from Lancaster County to Cass County, there is no evidence, direct or circumstantial, that at the time the trip began there was any plan or intent on the part of Ellis to ultimately commit a criminal act in Cass County, thereby satisfying the exception to § 29-1301.01. The majority assumes that the victim went from Lancaster County to Cass County with the accused against her will. Not even reliance upon circumstantial evidence can produce that result. "'"[C]ircumstantial evidence is evidence which, without going directly to prove the existence of a fact, gives rise to a logical inference that such fact does exist."'" *Bland v. Fox*, 172 Neb. 662, 665-66, 111 N.W.2d 537, 540 (1961). Or stated another way, "Circumstantial evidence is that which relates to a *series of facts* other than the fact in issue, which series of facts has been found, by reason of experience, to be so associated with the fact in issue that, in relation of cause and effect, they lead to a satisfactory conclusion." (Emphasis supplied.) 29 Am. Jur. 2d *Evidence* § 4 at 37 (1967). The only "series of facts" which we have in the instant case upon which our conclusion with regard to venue is based is the fact that the remains of Deborah A. Forycki were found in a water tank in Cass County, Nebraska, and there was some hair in a car owned by Ellis' former wife of the type similar to that of either the victim or the former wife's young child. Even assuming one may argue from the "series of facts" that the accused took the victim to Cass County in the automobile, one has no "series of facts" upon which a

jury may reasonably conclude that when the trip began in Lancaster County there was any intent to commit a criminal act in Cass County. We have never heretofore filled gaps in evidence with argument, no matter how logical or persuasive the argument may be.

Furthermore, it would seem that we determine there was venue in Lancaster County *after* we conclude that the accused committed the crime. Generally, venue being a jurisdiction matter, it must be established without regard to whether the individual accused is guilty. See *State v. Laflin*, 201 Neb. 824, 272 N.W.2d 376 (1978). I believe we have extended the exceptions of § 29-1301.01 beyond their reasonable limits. Venue was not properly laid in Lancaster County.

The question of venue, however, is not the most serious problem in this case. While in a criminal case all matters are of importance, I believe that the majority's interpretation of the exceptions to Neb. Rev. Stat. § 27-404(2) (Reissue 1979) is clearly in error and, if permitted to remain the law of this jurisdiction, will have effectively repealed the prohibition created both by statute and case law.

The majority acknowledges that evidence of other crimes, prior or subsequent, is generally inadmissible to prove the character of a person in order to show that he acted in conformity therewith. § 27-404(2). The exceptions are extremely limited. Pursuant to the statute, § 27-404(2), testimony may be offered for the purpose of showing (1) motive, (2) opportunity, (3) intent, (4) preparation, (5) plan, (6) knowledge, (7) identity, or (8) absence of mistake or accident. Taking each of the items listed one at a time, and carefully examining them, will quickly disclose that none of them have application to this case. We turn then to an examination of the various exceptions to determine whether evidence of subsequent criminal acts or crimes was admissible in the instant case.

The legal writers on the subject indicate that the elements of motive, opportunity, and intent are some-

what similar and can be discussed together. Motive has been defined in the law as the "[c]ause or reason that moves the will and induces action. An inducement, or that which leads or tempts the mind to indulge a criminal act." Black's Law Dictionary 914 (5th ed. 1979). In criminal law, "motive" is that which leads or tempts the mind to indulge in a criminal act. *State v. Knox*, 236 Iowa 499, 18 N.W.2d 716 (1945). See, also, *Williams v. State*, 113 Neb. 606, 204 N.W.64 (1925). Intent, likewise, has been defined as "[d]esign, resolve, or determination with which person acts." Black's Law Dictionary 727 (5th ed. 1979). "Intent" in criminal law means a state of mind which willingly consents to an act done, or free will choice, or volition in doing of an act. See *State v. McLeod*, 131 Mont. 478, 311 P.2d 400 (1957).

In common usage intent and motive are not infrequently regarded as one and the same thing. In law there is a distinction between them. Motive is the moving power which impels to action for a definite result. Intent is the purpose to use a particular means to effect such result. Motive is that which incites or stimulates a person to do an act, while intent means the intent to commit a crime or perform an act which is criminal in nature. Therefore, before evidence of another crime is admissible in evidence to prove that the act charged was done with a criminal motive or intent, it is necessary that the instant act be proven to have been committed. Evidence of a prior crime is not admissible to prove the commission of a subsequent act, but only to prove the motive or intent with which the subsequent act was committed. Until there is some evidence, direct or circumstantial, that the accused had committed *any act*, evidence of another crime to prove motive, intent, or opportunity is inadmissible. Logic would seem to make it clear that evidence of present motive, intent, or opportunity would be of no significance until there was some evidence that a present act had been committed by the accused.

In the instant case, the State was unable to offer any

evidence that the accused committed any particular act which resulted in Ms. Forycki's death. The motive which the prosecution sought to establish was that the accused sought sexual gratification from the victim and when it was refused, killed her. The State sought to base that conclusion on evidence that the defendant had sought sexual gratification from two others on subsequent occasions. The difficulty with the argument is that there is no evidence that the victim was sexually assaulted before she was killed. The prosecution also sought to establish intent by showing that the accused had on other occasions intentionally assaulted other women. Again, there is simply no evidence of any sexual assault in the present case. Such a conclusion is sheer speculation.

Attempting to establish the commission of a present act by showing the motive and intent involved in other subsequent acts is far beyond any permissible limits heretofore permitted. This is best illustrated by this court's decision in *State v. Franklin*, 194 Neb. 630, 234 N.W.2d 610 (1975), wherein we held that evidence of similar acts with third persons was not admissible. We said in *State v. Franklin, supra* at 642-43, 234 N.W.2d at 617: "It is the usual rule that in a criminal prosecution evidence of crimes committed by the accused, other than that with which he is charged, is not admissible. State v. Brown, 190 Neb. 96, 206 N.W.2d 331. An exception to the above rule is that evidence of similar offenses is admissible where an element of the crime charged is motive, a particular criminal intent, or guilty knowledge. State v. Ray, 191 Neb. 702, 217 N.W.2d 176; State v. Young, 190 Neb. 325, 208 N.W.2d 267; State v. Rich, 183 Neb. 128, 158 N.W.2d 533." Before we can address either nature or intent to commit an act, we must first establish the commission of the act. The evidence in this case fails in that regard.

Further, in *State v. Franklin, supra* at 643, 234 N.W. 2d at 618, we said: "*Evidence of similar crimes with third persons is not admissible.* Henry v. State, 136 Neb.

454, 286 N.W. 338; Nickolizack v. State, 75 Neb. 27, 105 N.W. 895." (Emphasis supplied.) Based upon our decision in *Franklin*, evidence of a prior crime with a third person would be inadmissible to establish motive, intent, or opportunity in the instant case. That being the case, how can the commission of a *subsequent* crime with a third person be admissible? The evidence introduced by the State was not admissible for the purpose of establishing motive, intent, or opportunity.

We turn then to "preparation and plan," which may be viewed together. Professor Wigmore, in his now famous work on evidence, discusses plan or design as follows: "Design or plan, however . . . is not a part of the issue, an element of the criminal fact charged, but is the preceding mental condition which evidentially points forward to the doing of the act designed or planned." 2 Wigmore on Evidence § 300 at 238 (1979). "Evidence showing a plan establishes a definite *prior* design, plan, or scheme which includes the doing of the act charged. As Wigmore states, there must be 'such a concurrence of common features that the various acts are materially to be explained as caused by a general plan of which they are the individual manifestations.'" (Emphasis supplied.) *State v. Spraggin*, 77 Wis. 2d 89, 99, 252 N.W.2d 94, 98-99 (1977). In other words, plan or design refers to a time *prior* to the commission of the act. To introduce evidence of subsequent acts in order to establish the fact that one had a plan or design prior in time appears to defy reason and logic. The fact that it may be shown that the accused assaulted an individual at a subsequent time does not logically establish that he had a plan to commit some other prior illegal act. In the instant case, the problem is even more compounded because here there is no evidence of what act was in fact committed and, therefore, no basis upon which we can determine a plan or design for committing the act. We are here attempting to prove the commission of an act by establishing the existence of a subsequent plan to commit a subsequent act. The evi-

dence of the subsequent acts could not have been introduced to prove "preparation or plan."

We turn then to the next item, "knowledge." Whether one argues that the introduction of testimony of the subsequent acts was for the purpose of showing Ellis' knowledge that the instant act committed was criminal or for the purpose of showing that he knew of the location of the water wagon, it was improper. There is no rational basis from which it may be argued that the fact that he knew something in 1976 means that he knew it in 1974. The use of circumstantial evidence is dependent upon the ability of one to reach a logical inference from the circumstances. The evidence of a subsequent act must be disregarded where, as here, it is introduced for the purpose of establishing the knowledge of the commission of a prior crime. There is simply no basis in reason or logic to maintain that the fact one knew something subsequent to the commission of an act proves he knew it prior to the commission of an act.

Even if we accept the State's argument that the purpose of the testimony of the subsequent act at Elmwood was simply to prove that the accused knew of the location of the area where the body was found, the testimony concerning what subsequently took place at the location with a third person was clearly improper and prejudicial. If admissible at all, the witness could have easily testified that she and the accused were at the location, thereby establishing the accused's knowledge of the location, without further testimony concerning what took place. While I do not believe that evidence of subsequent knowledge is admissible to prove prior knowledge, if it is permitted, it must be permitted in an extremely limited manner and for a limited purpose. In the instant case, that limitation was grossly exceeded, to the prejudice of the accused.

Moreover, the few cases that have discussed this matter of knowledge lead one to the conclusion that the introduction of another criminal act, whether prior or subsequent, may be allowed only for the purpose of

establishing the accused's knowledge that the act being committed was a crime, and for no other purpose. See 2 Wigmore on Evidence § 300 (1979). The testimony concerning subsequent acts with the two other women was inadmissible to prove "knowledge" in this case. This then leaves us with the matter of "identity."

Before evidence of another crime may be introduced for purposes of identity, the device used must be so unusual and distinctive as to be like a signature. McCormick on Evidence § 190 at 449 (2d ed. 1972). The majority in this case has concluded that the victim met her death by violent means. I am willing to accept that conclusion. Yet, as noted by the majority, all of the witnesses called for the purpose of establishing the cause of death were unable to testify as to the exact cause. We do not, to this day, know whether the victim died by strangulation following a sexual assault, by stabbing, by poisoning, or by shooting. The most we know is that she met her death by violent means. We have therefore concluded that *any* evidence of *any* subsequent violent act may be introduced in evidence to establish the identity of a prior act. Such a conclusion far exceeds any permissible limits existing as an exception to the rule that evidence of other crimes may not be introduced in evidence.

A very clear example of this is found in the case of *People v. Guerrero*, 16 Cal. 3d 719, 548 P.2d 366, 129 Cal. Rptr. 166 (1976), wherein the California Supreme Court was asked to review a judgment of conviction of first degree murder. Evidence of an uncharged rape occurring on an *earlier* occasion and involving a *different* victim was admitted in evidence. In permitting the evidence of the earlier crime to be admitted the trial court pointed to a number of asserted similarities between the rape and the charged murder, including the fact that each offense involved the use of a maroon Pontiac Le Mans automobile, with defendant driving; the victims were approximately the same age; on both occasions defendant initially had other males with him in

the car; in each offense defendant drove around the city, stopping at the same parking lot; in each case the parties made stops to buy beer and wine and each time defendant drove while drinking; each offense involved "sexually oriented activity"; both times the defendant took or attempted to take the girl home alone; and on both occasions the court can infer from the evidence that defendant used a wrench.

In rejecting the introduction of that testimony, however, the California Supreme Court said: "However, 'It has frequently been recognized . . . that because of the sound reasons behind the general rule of exclusion, the relevancy of evidence of other crimes, and therefore its admissibility, must be examined with care. [Citation.] The evidence should be received with "extreme caution," and if its connection with the crime charged is not clearly perceived, the doubt should be resolved in favor of the accused. [Citations.]'" *Id.* at 724, 548 P.2d at 368-69.

Going further, the California Supreme Court said: "On the issue of identity the evidence of the Lopez crime is not only cumulative, it is also irrelevant. Few of the asserted similarities between the Lopez and Santana offenses aid in placing defendant at the scene of the alleged murder. . . . If the victim had been attacked in a distinctive manner that was identical to a previous crime defendant had committed, then the evidence of the other crime might have probative value. But the only claimed connection that has any logical relevance is evidence of 'sexual activity' in both cases and the possible use of a wrench. Even if both facts were established — which, as will be discussed, is highly dubious — it could not reasonably be claimed that the two offenses were committed in a particularly distinct manner that tends to inculpate defendant." *Id.* at 725, 548 P.2d at 369.

Several Nebraska decisions would indicate that on careful analysis we would, likewise, adopt the California rationale. In *State v. Irwin*, 191 Neb. 169, 214

N.W.2d 595 (1974), we held that testimony concerning Irwin's previous trouble, even as background material, was erroneously admitted in evidence, saying at 189, 214 N.W.2d at 607: "The so-called background material was clearly irrelevant and immaterial and the rulings of the court on objections to the testimony were erroneous. The quoted information could only be designed to influence the verdict and the persistence of the witness in pursuing his course seemed designed to that end."

In *State v. Casados*, 188 Neb. 91, 94-95, 195 N.W.2d 210, 213 (1972), we said: "As a general rule, evidence of other crimes than that with which the accused is charged is not admissible in a criminal prosecution. Evidence of other crimes, similar to that charged, is relevant and admissible when it tends to prove a particular criminal intent which is necessary to constitute the crime charged. See State v. Easter, 174 Neb. 412, 118 N.W.2d 515.

"In many instances, courts have limited such evidence to proof of *prior* similar acts. Other courts have extended it to include similar acts occurring after the particular crime charged, *provided there was at least one former act.* In any event, proof of another distinct substantive crime is not admissible in a criminal prosecution unless there is some legal connection between the two upon which it can be said that one tends to establish the other or some essential fact in issue.

"'Peculiarly applicable to criminal cases is the rule which prohibits the introduction of evidence of other wholly independent offenses as the basis for an inference that the defendant is guilty of the offense for which he is being tried. * * * One basic reason for the rule is that such evidence is apt to be given too much weight, rather than too little, by the jury, thus resulting in the conviction of a defendant because he is a bad man and not because of his specific guilt of the offense with which he is charged.' 1 Jones on Evidence (5th Ed.), § 162, p. 290. See, also, 2 Wigmore on Evidence (3rd Ed.), § 302, p. 200." (Emphasis supplied.)

The majority has cited the case of *The State v. King*, 111 Kan. 140, 206 P. 883 (1922), as authority for the proposition that other offenses need not be prior in time. However, in the *King* case, there was both a *prior* murder as well as a *subsequent* murder. Moreover, in *King*, the evidence was such that one could determine the similarity in the cause of death in all three cases. That is not so in the case at bar. Because we do not know what happened to Ms. Forycki, we are unable to show any legal connection between the charged act and the subsequent acts upon which it can be said that one tends to establish the other or some essential fact in issue.

The admonition of the *Casados* decision is most applicable in the case at bar. The characteristics of the other offense and the charged offense must, indeed, be similar in detail and not merely in the fact that it was a like crime.

In *State v. Bly*, 215 Kan. 168, 174, 523 P.2d 397, 403 (1974), the Kansas Supreme Court repeated the generally recognized rule concerning the admissibility of other crimes by saying: "'The rule against the admissibility of evidence of other similar but independent offenses should always be strictly enforced . . . .'" Moreover, the Kansas Supreme Court specially found that evidence of other crimes should be excluded if its only purpose is to show the defendant's disposition, inclination, attitude, tendency, or propensity to commit crime. See, also, *Hertz v. State*, 160 Neb. 640, 71 N.W.2d 113 (1955); *City of St. Paul v. Greene*, 238 Minn. 202, 56 N.W.2d 423 (1952).

The mere fact that one may conclude that the victim met her death by violence is not sufficient to establish the requisite similarity between the manner in which she met her death and the subsequent acts committed by the accused. As a matter of fact, the evidence in the instant case, if it tends to prove anything, disproves that conclusion. The evidence of both subsequent incidents discloses that the accused retreated when the vic-

tim screamed and objected. In each subsequent instance, there was no injury committed to the individuals. To therefore suggest that, because there is evidence that on two subsequent occasions the accused retreated when rejected, we may conclude that there is a similarity with the commission of a murder is far beyond the exception to § 27-404(2).

The legal authors have further indicated that in addition to examining all of the items to determine relevancy, there must be a further examination made to determine whether, even if relevant and admissible, the evidence may not work great prejudice. In Nebraska we have, likewise, concerned ourselves with that fact by adopting Neb. Rev. Stat. § 27-403 (Reissue 1979), wherein it is said: "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."

McCormick on Evidence § 190 at 452-54 (2d ed. 1972) observes: "There is an important consideration in the practice as to the admission of evidence of other crimes which is little discussed in the opinions. This is the question of rule versus discretion. Most of the opinions ignore the problem and proceed on the assumption that the decision turns solely upon the ascertainment and application of a rule. If the situation fits one of the classes wherein the evidence has been recognized as having independent relevancy, then the evidence is received, otherwise not. This mechanical way of handling these questions has the advantage of calling on the judge for a minimum of personal judgment. But problems of lessening the dangers of prejudice without too much sacrifice of relevant evidence can seldom if ever be satisfactorily solved by mechanical rules. And so here there is danger that if the judges, trial and appellate, content themselves with merely determining whether the particular evidence of other crimes

does or does not fit in one of the approved classes, they may lose sight of the underlying policy of protecting the accused against unfair prejudice. The policy may evaporate through the interstices of the classification.

"Accordingly, some of the wiser opinions (especially recent ones) recognize that the problem is not merely one of pigeonholing, but one of balancing, on the one side, the actual need for the other-crimes evidence in the light of the issues and the other evidence available to the prosecution, the convincingness of the evidence that the other crimes were committed and that the accused was the actor, and the strength or weakness of the other-crimes evidence in supporting the issue, and on the other, the degree to which the jury will probably be roused by the evidence to overmastering hostility.

"Such a balancing calls for a large measure of individual judgment about the relative gravity of imponderables. Accordingly, some opinions stress the element of discretion. It should be recognized, however, that this is not a discretion to depart from the principle that evidence of other crimes, having no substantial relevancy except to ground the inference that accused is a bad man and hence probably committed this crime, must be excluded. The leeway of discretion lies rather in the opposite direction, empowering the judge to exclude the other-crimes evidence, even when it has substantial independent relevancy, if in his judgment its probative value for this purpose is outweighed by the danger that it will stir such passion in the jury as to sweep them beyond a rational consideration of guilt or innocence of the crime on trial. Discretion implies not only leeway but responsibility. A decision clearly wrong on this question of balancing probative value against danger of prejudice will be corrected on appeal as an abuse of discretion."

In the instant case, the introduction of subsequent acts was both inadmissible as not being an exception to

§ 27-404(2) and for the further reason that it was clearly prejudicial — not that it was harmful. As noted by the majority, evidence harmful to the defendant may be introduced. However, in the instant case, the evidence of subsequent acts was legally prejudicial to the rights of the accused to obtain a fair trial. The prejudice is evidenced by the verdict of the jury. As noted at the outset of this dissent, if the accused was guilty of anything, it was not manslaughter. The conclusion reached by the jury obviously was a compromise based in part upon evidence that the accused was a "bad man" who had committed other subsequent acts which should not be approved.

If the evidence of the two subsequent acts is omitted from the State's case, as it should have been, there was simply insufficient evidence upon which the case could have been submitted to the jury. Its verdict in the case would have been based upon absolute and sheer speculation. Believing as I do that the evidence of the two subsequent crimes should not have been permitted, I would reverse and dismiss.

MCCOWN, J., joins in this dissent.

BRODKEY, J., separately dissenting.

The facts of this bizarre case are set out in detail in the majority opinion, and also in the dissenting opinion written by Judge Krivosha; and, in the interest of brevity, will not be repeated in this dissenting opinion.

It is my opinion that the evidence adduced by the State at the trial of the defendant in District Court, even assuming for the moment that all of such evidence was properly received, was totally insufficient to establish beyond a reasonable doubt that the defendant was the person who killed Deborah Forycki, in which case he would not be guilty of the crime of homicide in any degree; and, more specifically, was completely insufficient to establish that the defendant was guilty of the crime of which he was convicted, to wit, manslaughter,

which not only requires the proof of a homicide committed by the defendant but also that the killing was done either upon a sudden quarrel or while in the commission of an unlawful act.

There were no eyewitnesses to the killing of Deborah Forycki, nor is there any direct evidence in the record establishing beyond a reasonable doubt when she was killed, where she was killed, and by whom and under what circumstances she was killed. There is not even evidence in the record establishing beyond a reasonable doubt what caused her death, i.e., by shooting, strangulation, stabbing, or in some other manner. There is no direct evidence in the record that the defendant even knew Deborah Forycki, or that they were seen together on the day of the alleged homicide. The evidence adduced by the State to prove these matters was all circumstantial in nature. The State introduced evidence to prove that defendant Ellis and Forycki had classes in the same building at the University of Nebraska on October 3, 1974, but such classes were not even in the same classroom. Apparently Ellis was absent from his class on that date. One might wonder how many other students were absent from classes in that building that day. Also, the police testified that after Forycki's disappearance on October 3, 1974, the police found an undated note while examining Forycki's possessions which read: "Meet John Kondowski 10:30 at the Student Union." The note, which was apparently misplaced by the police and not produced at the trial, does not indicate on what date she was to meet John Kondowski, or who he was. The State endeavored to supply this deficiency by introducing the evidence of a witness who testified that subsequent to October 3, 1974, she had a breakfast date with the defendant, whom she said used the alias of "John Tronzowski," during which she was assaulted by him, and that he used a knife in the course of the assault. The police witnesses for the State testified that they had checked the name of "John Kondowski" but their subsequent investigation failed to

reveal the existence of any person by that name in Lincoln. One might ask whether every person with a foreign sounding surname ending in "ski" in the Lincoln telephone book is automatically a suspect for the killing of Deborah Forycki. Finally, the State produced another witness who testified with reference to her experiences with Ellis in 1976, approximately 2 years after Forycki's disappearance. She testified that she was assaulted by Ellis on a farmstead in Cass County in June of 1976, which assault occurred within 75 feet of the location of the water wagon which contained the remains of Forycki. The witness was further allowed to testify, over objection, with regard to the details of the assault, which also involved a knife. Other evidence also established that Ellis was familiar with the area in which the water wagon containing the remains of Deborah Forycki was located.

The above constitutes the principal evidence adduced by the State against Ellis. While such evidence may be considered as sufficient to establish a "possibility" that Ellis may have killed Forycki, it falls far short of establishing a "probability" that he killed her, and even less to establish a "strong probability" that he did so. In no case could it be considered sufficient to establish proof "beyond a reasonable doubt," which is the test required by law in criminal cases. "Evidence creating a mere probability of guilt, even though a strong one, is not sufficient; much less is evidence creating a mere possibility of guilt, or evidence which gives rise to a mere suspicion or conjecture of guilt." 23 C.J.S. *Criminal Law* § 907 at 577 (1961). In *O'Connor v. State*, 110 Neb. 822, 829, 195 N.W. 125, 128 (1923), this court stated: "When it is sought to establish the guilt of the accused in a criminal case by circumstantial evidence, it is not sufficient that the facts create a *probability*, though a strong one." (Emphasis supplied.)

As previously stated, the evidence in this case upon which Ellis was convicted was largely, if not completely, circumstantial. In *State v. Doyle*, 205 Neb. 234,

240-41, 287 N.W.2d 59, 63-64 (1980), we reviewed the Nebraska authorities with regard to criminal convictions based upon circumstantial evidence. In that case we stated:

"In the recent case of State v. Klutts, 204 Neb. 616, 284 N.W.2d 415, we reviewed our rules with regard to a criminal conviction based upon circumstantial evidence, saying, 'Where circumstantial evidence is relied upon, the circumstances proven must relate directly to the guilt of the accused beyond all reasonable doubt in such a way as to exclude any other reasonable conclusion.' To justify a conviction on circumstantial evidence, it is necessary that the facts and circumstances essential to the conclusion sought must be proven by competent evidence beyond a reasonable doubt, and, when taken together, must be of such a character as to be consistent with each other and with the hypothesis sought to be established thereby and inconsistent with any other reasonable hypothesis of innocence. State v. Faircloth, 181 Neb. 333, 148 N.W.2d 187. Any fact or circumstance reasonably susceptible of two interpretations must be resolved most favorably to the accused. State v. Klutts, *supra*.

"In Reyes v. State, *supra*, we said, '[A] conviction should not be based upon suspicion, speculation, the weakness of the status of the accused, the embarrassing position in which he finds himself, or the mere fact that some unfavorable circumstances are not satisfactorily explained.'"

Under the standards and guidelines as set out in the above quotations the evidence was insufficient to establish beyond a reasonable doubt either that Ellis killed Forycki or, more specifically, that he killed her while in a sudden quarrel or while in the commission of an unlawful act.

The conclusion we have reached, as above stated, is made with reference to the evidence in the record as presented to this court. A fortiori, the conclusion is even more valid if the evidence received by the trial court,

particularly the testimony of the two witnesses who testified as to certain acts and experiences which occurred after the offense under consideration, to wit, the disappearance of Deborah Forycki on October 3, 1974, is not considered. If the testimony of both, or either, of these witnesses was improperly received, and is stricken from the record, the case of the State becomes so weak as to be almost nonexistent. I note in passing that Justice Krivosha in his dissenting opinion in this case would exclude the testimony of the two witnesses in question on the grounds that the criminal offenses to which they testified occurred subsequent to the crime involved in the instant case. I do not believe that the fact that the other crimes testified to occurred subsequent to the principal offense is determinative of the question of the admissibility of other crimes, but rather the important question is the remoteness of the other crimes in point of time. See, 29 Am. Jur. 2d *Evidence* § 327 (1967); *Goldsberry v. State*, 66 Neb. 312, 92 N.W. 906 (1902); *Payne v. State*, 233 Ga. 294, 210 S.E.2d 775 (1974); 2 Weinstein's Evidence ¶404[09] (1980); Annot., "Admissibility of Evidence of Subsequent Criminal Offenses as Affected by Proximity as to Time and Place," 92 A.L.R.3rd 545 et seq. (1979). The foregoing annotation, at 598, discusses cases in which evidence of similar subsequent offenses was received for the purpose of proving the identity of the perpetrator, where the subsequent offenses were not so remote so as to preclude admission. In this connection, see, also, McCormick on Evidence § 190 at 451-52 (2d ed. 1972).

On the other hand, Nebraska has clearly recognized the importance of the element of "remoteness" in the determination of whether evidence of other crimes is admissible. *State v. Moore*, 187 Neb. 498, 192 N.W.2d 155 (1971); *State v. Rich*, 183 Neb. 128, 158 N.W.2d 533 (1968). In *State v. Moore, supra* at 499, 192 N.W.2d at 156, we stated: "Whether such other crimes are too remote is determinable by the exercise of judicial discretion, the *limits of discretion being set by the facts*

of each case." (Emphasis supplied.)

In the instant case, the other crimes testified to by the two female witnesses occurred subsequent to the date of Forycki's disappearance. It is not clear how soon after October 3, 1974, the first incident at the breakfast occurred, but it apparently was during the same month. We are not prepared to state as a matter of law that this incident was too remote in time to be admitted under the rules above set out. However, the incident testified to by the second female witness occurred over 2 years after the disappearance of Forycki. In my opinion, the testimony of this witness should have been excluded as being too remote in time. The testimony of this witness was undoubtedly prejudicial inasmuch as she was the one who testified that Ellis had taken her to the same locality in which the water wagon was located. In my opinion, the admission of this testimony was clearly improper; and, at the minimum, should entitle the defendant to a new trial.

As a matter of fact, I am convinced that the evidence of both of the female witnesses should have been excluded for another reason. The applicable statute involved in this case is Neb. Rev. Stat. § 27-404(2) (Reissue 1979) which provides: "(2) Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident."

The purpose for such rule was set out in *Whitty v. State*, 34 Wis. 2d 278, 292, 149 N.W.2d 557, 563 (1967), where the court stated: "The character rule excluding prior-crimes evidence as it relates to the guilt issue rests on four bases: (1) The overstrong tendency to believe the defendant guilty of the charge merely because he is a person likely to do such acts; (2) the tendency to condemn not because he is believed guilty of the present charge but because he has escaped punishment from

other offenses; (3) the injustice of attacking one who is not prepared to demonstrate the attacking evidence is fabricated, and (4) the confusion of issues which might result from bringing in evidence of other crimes."

Trial courts are given the difficult task of balancing the need for the evidence of other crimes against the degree to which the jury will be prejudiced by such evidence. See *State v. Williams*, 205 Neb. 56, 287 N.W.2d 18 (1979). Such discretion empowers "the judge to exclude the other-crimes evidence, even when it has substantial independent relevancy, if in his judgment its probative value for this purpose is outweighed by the danger that it will stir such passion in the jury as to sweep them beyond a rational consideration of guilt or innocence of the crime on trial." McCormick on Evidence § 190 at 453-54 (2d ed. 1972). See, also, 1 Underhill's Criminal Evidence § 205 (6th ed. 1973).

In this case we believe such evidence had a prejudicial effect upon the jury. It must be remembered that Ellis was charged solely with the first degree murder of Forycki. To prove its case, the State adduced evidence that Ellis had assaulted two other women with a knife during attempts to engage in sexual relations with them. The closing argument of the State makes quite clear the purpose for which evidence of such other crimes or bad acts was adduced. The State argued that because Ellis engaged in assaults against other women, it necessarily followed that he must have engaged in an assault against Forycki. Therefore, the State contended that the evidence of other assaults showed the motive, intent, *modus operandi*, and/or plan for the assault and homicide of Forycki, even though there is no evidence of the use of a knife on Forycki.

The use of such evidence is nebulous, at best; and if considered to show knowledge of the secluded area where the body was found, such evidence was not required, as the witness Burns testified that Ellis had knowledge of the area. If considered to prove the identity of the defendant Ellis, it is generally held that a

higher standard is required, and that the prior or subsequent crimes testified to must exhibit a high degree of similarity to the acts with which the accused is charged and must in effect be the "signature or handiwork" of the accused. See, *United States v. Silva*, 580 F.2d 144 (5th Cir. 1978); McCormick on Evidence § 190 at 449 (2d ed. 1972). As previously pointed out, in the instant case, while it is true in the incidents testified to by the two witnesses referred to, Ellis had in both instances used a knife in an unsuccessful attempt to accomplish his purpose, yet, there is nothing in the record of this case to indicate that Forycki had died from a knife wound. In fact, the evidence indicates that the cause of her death might possibly have been a shooting by a gun. Moreover, if the testimony of the second witness, whose incident occurred 2 years after the disappearance of Forycki, is not considered, no *modus operandi* is established which would justify the use of such evidence in an effort to convict Ellis of first degree murder, as charged. A review of the evidence adduced by the two female witnesses, and an analysis of the use of such evidence during the trial, convinces us that the evidence of the subsequent events was used to replace evidence of what happened to Deborah Forycki. The inescapable conclusion is that the evidence was offered for the purpose of establishing that if Ellis assaulted the two witnesses with a knife, which was done after Forycki's disappearance, he therefore murdered Deborah Forycki.

It seems clear that the proof of Ellis' guilt was based on other "bad acts" committed by him, rather than on the commission of the crime for which he stood trial. This is exactly what § 27-404(2) was intended to prevent. In effect, the State stripped Ellis of his presumption of innocence.

Our criminal justice system is based on the premise that a criminal defendant is innocent until proven guilty by the State of the crime for which he stands trial. It is axiomatic that the criminal defendant cannot

be convicted of the crime charged solely on the basis of other crimes or bad acts. The right to a fair trial must necessarily include the right to be tried solely for the crime charged. I am convinced that Ellis was not only standing trial for the homicide of Forycki but also for the assaults on the other two witnesses, at least in the jurors' minds. The evidence with reference to the other assaults should not have been admitted because Ellis, in addition to the homicide of Forycki, was, in effect, standing trial for crimes with which he was not charged.

It may well be that the defendant in this case is, in fact, guilty of the crimes with which he was charged and convicted, but the State in this case has failed to prove it by proper evidence "beyond a reasonable doubt." In this case, even taking the view most favorable to the State, there is insufficient evidence to sustain the verdict. Justice requires that we abide by the established rules of evidence. If I may borrow the words of Justice Spencer in his dissenting opinion in *State v. Ohler*, 178 Neb. 596, 604-06, 134 N.W.2d 265, 270-71 (1965): "I believe our rule still is that an accused is presumed to be innocent until he has been proved guilty beyond a reasonable doubt. The defendant has been convicted solely because he had an opportunity to commit the crime because he was on the scene during a part of the period within which the crime could have been committed. . . . The most we can say about the evidence adduced is that the defendant had an opportunity to commit the crime and there is a strong suspicion that he did, but this falls far short of proving him guilty beyond a reasonable doubt. There is no question but that the actions of the defendant were to say the least very suspicious, yet suspicion does not suffice for evidence." In the instant case there was not even evidence that the defendant was present at the scene of the crime at the time it was committed.

As a result of my examination of the record, I am of the opinion that the defendant did not have a fair and

impartial trial according to law and the established rules of criminal procedure to which every person, whether guilty or innocent, is entitled. I would prefer to reverse the judgment and conviction by the District Court and remand the cause for a new trial. However, my attention has been directed to a very recent opinion released by the Supreme Court of the United States in the case of *Hudson v. Louisiana*, No. 79-5688, 49 U.S.L.W. 4159, decided February 24, 1981, in which the court indicates that the double jeopardy rule prevents the prosecution of a defendant a second time for first degree murder where either the trial judge or the appeal court has decided that the evidence was legally insufficient to support the jury's guilty verdict. In view of the implications of *Hudson v. Louisiana*, therefore, and also in view of my conclusions as expressed in my dissenting opinion set out above in which I have concluded that there was insufficient evidence to convict the defendant even considering the testimony of the two female witnesses, I would hold that the judgment of conviction and sentence by the trial court should be vacated and the cause dismissed.

McCOWN, J., joins in this dissent.

GENOA NATIONAL BANK, GENOA, NEBRASKA, APPELLEE AND CROSS-APPELLEE, V. JOHN D. SORENSEN, APPELLEE, JAMES FICHTL, JR., INTERVENOR-APPELLANT AND CROSS-APPELLEE, ROY E. NELSON AND ANNE NELSON, INTERVENORS-APPELLEES AND CROSS-APPELLANTS.

304 N.W.2d 659

Filed March 27, 1981. No. 43122.

1. **Uniform Commercial Code.** Courts are to construe and apply the Uniform Commercial Code liberally to promote its underlying purposes and policies.
2. **Uniform Commercial Code: Liens.** If an otherwise unperfected lien is not filed at all the proper places at the time of filing, but through the passage of time or change in character of the property becomes a proper filing under the provisions of the Uniform Commerical Code, the lien also becomes properly perfected and has superior rights over all other liens not otherwise perfected prior to the time that the previous security lien was perfected.

Appeal from the District Court for Colfax County: JOHN C. WHITEHEAD, Judge. Reversed and remanded with directions.

Donn K. Bieber of Otradovsky & Bieber for appellant Fichtl.

Edward Asche for cross-appellants Nelson.

Donald R. Treadway of Brower, Treadway & Bird, P.C., for appellee Bank.

No appearance for appellee Sorensen.

Heard before KRIVOSHA, C.J., BOSLAUGH, MCCOWN, CLINTON, BRODKEY, WHITE, and HASTINGS, JJ.

KRIVOSHA, C.J.

This appeal presents to the court what appears to be a case of first impression under the provisions of Neb. U.C.C. art. 9 (Reissue 1971). The District Court, after trial, determined that the Genoa National Bank (bank) as judgment creditor of John D. Sorensen (Sorensen), had

a superior lien on certain harvested crops owned by Sorensen and then being held at the Farmers Union Cooperative Association at Richland, Nebraska, over the security liens of the appellant, James Fichtl, Jr. (Fichtl), and the security interest of the appellants, Roy E. Nelson and Anne Nelson (Nelson), even though the Fichtl lien and the Nelson lien were acquired prior in time to the judgment lien. We believe that the Uniform Commercial Code requires a contrary conclusion and that the decision of the trial court must be reversed.

On September 12, 1977, Sorensen executed and delivered to Fichtl a security agreement and financing statement covering growing crops on certain land leased by Sorensen. A copy of the financing statement was filed in the office of the clerk of Colfax County on September 14, 1977, but not until November 3, 1978, was it filed with the Public Service Commission as required by the provisions of Neb. U.C.C. § 9-401 (1) (a) (Cum. Supp. 1978) which became effective on September 2, 1977.

Further, the record reflects that on September 22, 1977, Sorensen made, executed, and delivered to Nelson a security instrument and financing statement, also covering crops growing on land leased by Sorensen. Nelson's financing statement was filed on September 22, 1977, in the office of the clerk of Colfax County, Nebraska. It was not filed with the Public Service Commission, as required by the provisions of § 9-401(1)(a), until November 17, 1978.

On October 21, 1977, the crops covered by the security documents were all harvested and taken from the fields to an elevator at Richland, Nebraska, where they were held in the fall of 1978.

On October 11, 1978, the appellee bank obtained a judgment against Sorensen based upon promissory notes executed by Sorensen; and on October 19, 1978, the bank caused the sheriff to levy execution, attaching the grain in the Richland elevator. Both Fichtl and Nelson intervened in the action brought by the bank

against Sorensen for the purpose of having their liens declared prior and superior to that of the judgment creditor.

The bank argued and the trial court agreed that the liens of Fichtl and Nelson were inferior to the judgment lien of the bank because Fichtl and Nelson had failed to file their financing statements with the Public Service Commission in accordance with the provisions of § 9-401(1)(a). We believe that in that respect the bank is in error.

While there appears to be no specific statutory provision contained within the Uniform Commercial Code nor any specific case directly on point, we believe that the language of the code requires us to find that the liens of Fichtl and Nelson were perfected prior to the bank acquiring its judgment lien and, therefore, prior and superior to the lien of the bank.

Though no longer the law (see Neb. U.C.C. § 9-401 (Cum. Supp. 1980)), at the time relevant to this action, § 9-401 provided in part as follows: "(1) The proper place to file in order to perfect a security interest is as follows: (a) When the collateral is *unharvested crops*, then in the office of the county clerk in the county where the land, on which the crops are growing or are to be planted and grown, is located, and in the office of the Public Service Commission, where a duplicate copy shall be filed and indexed as a crop lien. There shall be no filing fee or charge for the filing of a duplicate. . . . (c) When the collateral is any other type of tangible or intangible personal property, the following rules apply: When the debtor is a resident of this state, then in the office of the county clerk in the county of the debtor's residence." (Emphasis supplied.) The language of the statute indicates that if crops are "unharvested," then a filing must be made in both the office of the county clerk and the Public Service Commission. On the other hand, if the crops are *harvested*, then no duplicate filing need be made in the office of the Public Service Commission and the filing of a financing statement in

the office of the county clerk alone is sufficient.

Likewise, the act makes further provisions concerning when a lien attaches. Neb. U.C.C. § 9-303 (Reissue 1971) provides in part as follows: "(1) A security interest is perfected when it has attached and when all of the applicable steps required for perfection have been taken. Such steps are specified in sections 9-302, 9-304, 9-305 and 9-306. *If such steps are taken before the security interest attaches, it is perfected at the time when it attaches.*" (Emphasis supplied.)

Neb. U.C.C. § 9-402 (Reissue 1971) provides in part: "(1) . . . A financing statement may be filed before a security agreement is made or a security interest otherwise attaches."

Neb. U.C.C. § 9-402 (Reissue 1971) provides in part: in part as follows: "(1) except as otherwise provided in subsection (2), an unperfected security interest is subordinate to the rights of . . . (b) a person who becomes a lien creditor . . . *before* [the security interest] is *perfected* . . . ." (Emphasis supplied.) Subsection (2) has no application to the case at bar.

Section 9-401(2) further provides as follows: "A filing which is made in good faith in an improper place or not in all of the places required by this section is nevertheless effective with regard to any collateral as *to which the filing complied with the requirements of this article* . . . ." (Emphasis supplied.)

The evidence is clear beyond contradiction that had the crops remained "unharvested" until such time as the judgment creditor had obtained its judgment and levied execution, it would clearly have priority over the security creditors who had failed to file their financing statements in both the offices of the county clerk and the Public Service Commission. But that is not the fact with which we are presented. In this case, long before the judgment creditor acquired any interest upon which levy could be executed, the crops were harvested and taken to an elevator. In essence, the bank urges us to find that if a filing is improperly made at the outset,

it may never be corrected or made valid. We do not believe that to be either a proper reading of the code or its intended purpose.

In *North Platte State Bank v. Production Credit Assn.*, 189 Neb. 44, 55-56, 200 N.W.2d 1, 8 (1972), we said: "'The fundamental purpose of Art. 9 of the code is to make the process of perfecting a security interest easy, simple, and certain. It was intended to be a complete reversal of prior chattel security law and to rid the unaware of the traps of requirement of specific types of acknowledgements, technical affidavits of consideration, selection of specific proper forms, and other pitfalls that were not uncommon. The code very simply and briefly provides for a notice-filing procedure with a minimum of information required to be publicized in a filed financing statement. All that is required is a minimal description, and it may be by type or kind. The statement need not necessarily contain detail as to collateral, nor any statement of quantity, size, description or specifications, or serial numbers. *No preciseness is required with respect to whether the collateral exists at the time of filing or is to be acquired thereafter*, and no statement of charges, payment schedule, or maturity date need be included in the statement. The first to file shall prevail.'" (Emphasis supplied.) Furthermore, in *Putnam Ranches, Inc. v. Corkle*, 189 Neb. 533, 535, 203 N.W.2d 502, 503 (1973), we said: "Courts are to construe and apply the Uniform Commercial Code liberally to promote its underlying purposes and policies."

Obviously, the purpose of filing is to give constructive notice to the world and actual notice to those who would take the trouble to look. If at any time after October 21, 1977, the date on which the crops were harvested, and October 11, 1978, the date on which the bank acquired its judgment lien, Fichtl or Nelson wished to take further action to perfect their liens upon harvested crops, they would have been required to simply refile their financing statement in the office of the county clerk where it was already on file. Because the crops

were then harvested, the provisions of § 9-401(1)(a) were no longer applicable. In essence, what we are saying if we accept the bank's position is that even though there was a financing statement on file in the office of the county clerk prior to the time that the bank acquired its judgment and levied execution, and was proper in all respects as to harvested crops, we should ignore that financing statement because the security holders did not have a second stamp placed upon the document after the crops were harvested. We believe that to make such a requirement would be to simply ignore the realities of life and the intent and purpose of the Uniform Commercial Code.

We have already noted that one may file a security instrument in advance of acquiring an interest in property, the interest attaching when all the requirements have been met. We see no reason, therefore, why we may not hold, at a minimum, that we may consider Fichtl's and Nelson's filings to have been made in advance of their acquiring their interest in the harvested crops and attaching at such time as the crops were harvested, thereby eliminating the requirement of a duplicate filing.

The code makes it clear that if the filing was properly perfected when made, a change in status will not deprive the holder of its lien interest. See § 9-401 (3). The code, likewise, provides that a financing statement may be filed before the security interest attaches. § 9-402 (1). We, likewise, see no reason for not holding that where a lien interest satisfies all the requirements of the code with regard to a particular type of property before any other intervening interest attaches, it should be recognized even though not proper when filed. We therefore believe the better rule, and the one supported both by the language of the Uniform Commercial Code and logic, requires us to hold that if an otherwise unperfected lien is not filed at all the proper places at the time of filing, but through the passage of time or change in character of the property becomes a proper

filing under the provisions of the Uniform Commercial Code, the lien also becomes properly perfected and has superior rights over all other liens not otherwise perfected prior to the time that the previous security lien was perfected.

We therefore believe that the decision of the trial court must be reversed and the action remanded for further proceedings consistent with this opinion.

REVERSED AND REMANDED WITH DIRECTIONS.

JULIA WEISS, STANLEY K. WEISS, WESLEY WEISS, AND LARRY WEISS, APPELLANTS AND CROSS-APPELLEES, V. HANS MEYER, PERSONAL REPRESENTATIVE OF THE ESTATE OF FRIEDRICH WILHELM BREDER, HANS MEYER, INDIVIDUALLY, AND GWENDOLYN MEYER, INDIVIDUALLY, APPELLEES AND CROSS-APPELLANTS.

303 N.W.2d 765

Filed March 27, 1981. No. 43186.

1. **Equity: Appeal and Error.** In actions in equity, it is the duty of the Supreme Court to try the issues of fact de novo on the record and to reach an independent conclusion thereon without reference to the findings of the District Court.
2. **Adverse Possession: Proof.** One who claims title by adverse possession must prove by a preponderance of the evidence that he has been in actual, continuous, exclusive, notorious, and adverse possession under a claim of ownership for a full period of 10 years.
3. **Statute of Limitations: Adverse Possession.** In Nebraska the law is settled that the operation of the statute of limitations is to vest absolute title in the occupant, when he has maintained an actual, continued, notorious, and adverse possession under claim of ownership for the statutory period.
4. **Adverse Possession.** In determining the rights of an adverse owner, the entry and possession of his tenant, expressly authorized to act, is the entry and possession of such owner.
5. **Words and Phrases: Adverse Possession: Intent.** "Claim of ownership" as used in the law of adverse possession means nothing more than the intention of the occupant to appropriate and use the land as his own to the exclusion of all others, irrespective of any semblance or shadow of actual right or title.

6. **Adverse Possession: Intent: Proof.** Adverse possession is founded upon the intent with which an occupant held possession, and can best be determined by his acts.
7. **Adverse Possession: Intent.** The intent, even though mistaken, is sufficient as where the claimant occupies to the wrong line believing it to be the true line and even though he does not intend to claim more than that described in the deed.
8. **Adverse Possession: Notice.** The real purpose of prescribing the manner in which an adverse holding will be manifested is to give notice to the real owner that his title or ownership is in danger so that he may, within the period of limitation, take action to protect his interest. It is the nature of the hostile possession that constitutes the warning, not the intent of the claimant when he takes possession.
9. **Adverse Possession.** The law does not require that possession shall be evidenced by a complete enclosure, nor by persons remaining continuously upon the land and constantly from day to day performing acts of ownership thereon. It is sufficient if the land is used continuously for the purposes to which it may be in its nature adapted. In this respect, ordinarily the law does not undertake to specify the particular acts of occupation by which alone title by adverse possession may be acquired since the existence and establishment of the continuity must necessarily depend greatly on the circumstances of each case, and the use to which the property is adapted, the actual manner of its use, the circumstances of the occupant, and to some extent his intention must be considered. It is enough, however, that the land be devoted to the ordinary uses of the adverse claimant, provided the uses are such as to put the true proprietor on notice.
10. ——. Land may be generally adapted to more than one use, and if the land is used for one or more of the major purposes for which it may in its nature be adapted, then that use will be sufficient to establish continuity of possession, provided such use is sufficient to put the titleholder on notice.

Appeal from the District Court for Perkins County: JACK H. HENDRIX, Judge. Affirmed.

Jacobsen, Orr & Nelson for appellants.

Firmin Q. Feltz for appellees.

Heard before KRIVOSHA, C.J., MCCOWN, BRODKEY, and HASTINGS, JJ., and HICKMAN, District Judge.

HICKMAN, District Judge.

This equitable action was brought pursuant to Neb. Rev. Stat. § 34-301 (Reissue 1978) by appellants, here-

after referred to as petitioners, to have the court establish their southern boundary line to the north half of the southeast quarter of Section 28, Township 12 North, Range 37 West of the 6th P.M. in Perkins County, Nebraska. Petitioners also own the entire northeast quarter of the same section, but that land is not involved in this appeal.

Petitioner Julia Weiss is the record titleholder, and petitioners Stanley K., Wesley, and Larry Weiss are her sons and the contract purchasers of the above-described property.

The original respondent, Friedrich Breder, hereafter referred to as Fred, was the record owner of the south half of the southeast quarter of Section 28, Township 12 North, Range 37 West of the 6th P.M. in the same county, which real estate adjoins petitioners' farm on the south. Fred died after entry of judgment by the court on May 23, 1979, and the action was revived in the names of the present appellees, who are the personal representatives of Fred's estate and the devisees of the real estate involved under his will.

The dispute between the parties arose when Fred, in his answer, claimed by adverse possession for the statutory period certain of the petitioners' property up to a certain farming line.

The trial court, after hearing the evidence, found that Fred had indeed acquired a part of the ground he claimed by adverse possession, but not all of it. Petitioners were not happy with losing their land and Fred was not happy with getting less than he claimed. This situation brought about petitioners' appeal and the cross-appeal by the appellees. In addition, the appellees have filed in this court a motion to dismiss petitioners' appeal.

Petitioners contend that the trial court erred (1) in failing to find that Fred's use of the disputed tract was an occasional trespass; (2) in finding that Fred acquired title to the disputed tract by adverse possession; (3) in finding that Fred's use of the disputed tract was that

for which the land was adapted; and (4) in failing to find that the boundary line separating the properties of the parties was a straight line running east and west from the southwest corner of the north half of the southeast quarter to the southeast corner of the north half of the southeast quarter.

In actions in equity, it is the duty of the Supreme Court to try the issues of fact de novo on the record and to reach an independent conclusion thereon without reference to the findings of the District Court. *Layher v. Dove*, 207 Neb. 736, 301 N.W.2d 90 (1981).

"One who claims title by adverse possession must prove by a preponderance of the evidence that he has been in actual, continuous, exclusive, notorious, and adverse possession under a claim of ownership for a full period of 10 years." *Layher v. Dove*, *supra* at 739, 301 N.W.2d at 92. The statutory period in Nebraska is 10 years. Neb. Rev. Stat. § 25-202 (Reissue 1979). "'In Nebraska the law is settled that the operation of the statute of limitations is to vest absolute title in the occupant, when he has maintained an actual, continued, notorious, and adverse possession under claim of ownership for the statutory period.'" *Walker v. Bell*, 154 Neb. 221, 222, 47 N.W.2d 504, 505 (1951). "Claim of ownership," as used in the law of adverse possession, means nothing more than the intention of the occupant to appropriate and use the land as his own to the exclusion of all others, irrespective of any semblance or shadow of actual right or title. *Barnes v. Milligan*, 200 Neb. 450, 264 N.W.2d 186 (1978). "In determining the rights of an adverse owner, the entry and possession of his tenant, expressly authorized to act, is the entry and possession of such owner." *Cassens v. Wisner*, 122 Neb. 408, 240 N.W. 526 (1932) (syllabus of the court). Adverse possession is founded upon the intent with which an occupant held possession, and can best be determined by his acts. *Purdum v. Sherman*, 163 Neb. 889, 81 N.W.2d 331 (1957). The intent, even though mistaken, is sufficient as where the claimant occupies to the

wrong line believing it to be the true line and even though he does not intend to claim more land than that described in the deed. *Barnes v. Milligan, supra.* The real purpose of prescribing the manner in which an adverse holding will be manifested is to give notice to the real owner that his title or ownership is in danger so that he may, within the period of limitation, take action to protect his interest. It is the nature of the hostile possession that constitutes the warning, not the intent of the claimant when he takes possession. *Purdum v. Sherman, supra.* The law does not require that possession shall be evidenced by a complete enclosure, nor by persons remaining continuously upon the land and constantly from day to day performing acts of ownership thereon. It is sufficient if the land is used continuously for the purposes to which it may be in its nature adapted. *James v. McNair,* 164 Neb. 1, 81 N.W.2d 813 (1957); *Lantry v. Parker,* 37 Neb. 353, 55 N.W. 962 (1893). In this respect, "Ordinarily the law does not undertake to specify the particular acts of occupation by which alone title by adverse possession may be acquired since the existence and establishment of the continuity must necessarily depend greatly on the circumstances of each case, and the use to which the property is adapted, the actual manner of its use, the circumstances of the occupant, and to some extent his intention must be considered. It is enough, however, that the land be devoted to the ordinary uses of the adverse claimant provided the uses are such as to put the true proprietor on notice." 2 C.J.S. *Adverse Possession* § 125 at 681 (1936), now 2 C.J.S. *Adverse Possession* § 150 at 866 (1972).

Petitioner Julia Weiss acquired title to the property in 1943 by virtue of a referee's deed, although the land had been in the family since it was homesteaded by her father. Julia and the contract purchasers all appear to have been and now are absentee owners and have continuously paid the taxes thereon. The petitioners' cultivated land which is to the north of the disputed tract

has been tilled by the present tenant and was originally broken from sod by the tenant's father before him under the auspices of Julia's father. The disputed tract is the southern portion of the north half of the southeast quarter and, until 1974, was in its natural state, that is, unbroken and producing the natural grasses so commonly found in Nebraska. Fred's adjoining land to the south also existed in its natural state until 1974.

It appears that the land surrounding that of Fred and the petitioners was at all times suitable to cultivation and crop production, and the topography and soil content are essentially the same as that of the land of the parties to this action.

A road runs along the east side of both properties, and there is a road along the south side of Fred's property. The west side of both properties is divided by a neighbor's fence, and there is some discussion in the record that there was a gate post in the vicinity of the north-south division line which allowed entrance to the neighbor's field to the west, although the testimony as to the location of this post is purely speculation on the part of the witnesses.

The petitioners' tenant, John Froschheiser, and his father before him created, by the use of cultivation equipment, a farming line north of the actual property line established by the deeds, and this line has existed for perhaps 60 years. To the south of the farming line the natural grasses grew, and there was no fencepost, fencing, ditch, or other monument by which anyone could accurately determine where the division line between the north half and the south half of the southeast quarter lay. Fred directed his tenants or custom hay cutters to mow the hay up to the farming line and, after it cured, the hay was pulled together in stacks on his land or was baled and picked up.

In several of the drought years in the 1930s, the grass was too sparse to mow, and in other years, none of which are set forth with clarity, the grass on the disputed tract was only spot cut. In good years all of the grass was

mowed, cured, and then baled or stacked on Fred's land.

Petitioners' tenant has observed Fred's crews cutting hay each year that the hay was cut and states that it took from 4 days to 3 or 4 weeks to mow, cure, and stack the hay from both Fred's ground and the disputed tract, depending upon the weather: "Q. . . . Mr. Froschheiser, did you have an opportunity to observe the actual hay cutting at any time during the 60 years or so you farmed the Weiss Farms property? The hay cutting that went on this hayland that we are speaking of? A. Yeah, I was there every year."

Petitioner Stanley Weiss testified that he was assisting his mother in handling the farm and became aware of the boundary problem in the early 1960s, before 1965, but did not advise her of the problem because he did not wish to put a strain on his mother. Stanley and his brothers did not become contract purchasers until 1975.

It is evident that Stanley was acting as his mother's agent prior to his becoming one of the contract purchasers, and thus his knowledge of the boundary problem before 1965 is imputed to Julia under the doctrine of agency.

The evidence indicates that the invasion onto the disputed tract by those under Fred's direction lasted from 4 days to 4 weeks depending upon the weather and then only once a year for the purpose of making hay. It is obvious from the evidence that Fred and those operating under his direction were mistaken as to the location of the boundary of Fred's property. It is equally apparent that for 60 or so years the petitioners' tenant was aware that each year Fred was taking the hay up to the farming line established by the tenant and his father before him.

Petitioners complain that the court erred in finding that Fred was using the land for the purpose for which in its nature it may be adapted, that is, to crop production.

Fred was using his own land to the south as hay land, one of the uses to which the land was adaptable, as he had a right to do. In Nebraska such grasses usually lend themselves to only an annual cutting. Although most of the neighboring land was being used for crop production, it was in its natural state adapted to the production of hay. Production of hay for feed is a vital part of the farming industry as it was 60 years ago. As long ago as 1893, we stated: "In the case of arable land it is not necessary, in order to hold possession, that one should continuously have a crop in the ground. It is sufficient if, during the seasons of the year when crops are grown, the land be used for that purpose; and from harvest to seed-time one's possession is not interrupted, although during that period no acts of ownership may be exercised." *Lantry v. Parker*, 37 Neb. 353, 356, 55 N.W. 962, 963 (1893).

There is no evidence that the petitioners or their tenants have used or been on the disputed tract from the time the farming line was established until 1974, and the fact that Julia and her father paid the taxes is not determinative, but only an element and circumstance which may be considered, together with all the circumstances of the case, with respect to the subject of adverse possession. *Dunnick v. Stockgrower's Bank of Marmouth*, 191 Neb. 370, 215 N.W.2d 93 (1974).

We hold that, under the facts of this case, the annual production of hay by Fred or those under his direction for 60 or more years was more than an occasional trespass and was sufficient to constitute adverse possession.

Since it is evident that land may be generally adapted to more than one use, we hold that if the land is used for one or more of the major purposes for which it may by its nature be adapted, that use will be sufficient to establish continuity of possession, provided such use is sufficient to put the record titleholder on notice.

Finding no merit to the petitioners' assignments of error, we turn to the cross-appeal of the appellees. Petitioners argue that appellees failed to file a motion

for a new trial and thus this court can only determine whether or not the pleadings support the judgment rendered. This may have been the law prior to February 6, 1981, but this court in *Petersen v. Petersen*, *ante* p. 1, 301 N.W.2d 592 (1981), held that an appeal from a judgment in an equitable action does not require the filing of a motion for a new trial for a de novo review in this court of alleged errors in the findings and judgment of the trial court. We therefore review the findings and judgment of the trial court for possible error pursuant to the cross-appeal.

Appellees contend that there is a variance between the evidence and the findings and order of the trial court. Appellees would have us rely on a surveyor's certificate attached to their motion to dismiss; we observe that the surveyor's certificate made after the trial of this case is not part of the record and will not be considered. The only competent evidence in the record relating to distances from which the lower court could establish a boundary was the testimony of Charles D. McCullough, director of the local A.S.C.S. office, and his affidavit. Under his supervision, aerial photographs of the land involved were measured. This witness was frank to admit that measurements from the aerial photographs were subject to an error factor of less than 1 percent, which translated into 15 to 20 feet. The District Court found that the burden of proof was on Fred to establish his claim of adverse possession and that Fred was entitled to "only the lesser of the land established by his proof." Taking into consideration the error factor testified to by McCullough and the fact that the point at which the rule or measuring device was laid on the aerial photographs when measurements were made on the 1960 and 1966 aerial photographs is unknown, we cannot say as a matter of law that the trial court was clearly wrong in its location of the boundary line as described in its findings. It would serve no useful purpose to set out in this opinion the trial court's findings without the reader having the benefit of

the various exhibits to compare with it.

Subsequent to the entry of judgment by the District Court, and while this case was pending on appeal, the appellees filed a motion to dismiss the petitioners' appeal based upon the allegation that the petitioners had accepted the benefits of the decree of the District Court. It appears that, following the entry of the decree, petitioners' tenant, at the request of the petitioners, had the land surveyed in accordance with the findings of the District Court, installed several posts on the boundary line as established by the District Court, and thereafter tilled and cropped up to that line. No fencing was attached to the several posts to connect them. Petitioners claim the setting of the posts was a temporary act pending resolution of the appeal and was done to prevent further crowding onto their land by appellees. We find that petitioners' act, through their tenant, in setting several posts was one of self-protection and was not done with the intent to accept the benefits of the decree of the District Court. Appellees' motion to dismiss is thus overruled.

Under the facts and circumstances of this particular case, we find that the judgment of the District Court should be affirmed, the cross-appeal dismissed, and the motion to dismiss the appeal overruled.

AFFIRMED.

MERLE NICOLA, TRUSTEE IN BANKRUPTCY OF INTERSTATE MACHINERY & SUPPLY COMPANY, BANKRUPT, APPELLEE, V. E. O. PETERS, INC., APPELLANT.

303 N.W.2d 771

Filed March 27, 1981. No. 43261.

1. **Bankruptcy.** Prior to October 1, 1979, before the 1978 Bankruptcy Act took effect, the bankruptcy court had summary jurisdiction over controversies with respect to property passing to the trustee under the act when the property was within the actual or constructive possession of the bankruptcy court or when the adverse claimant to the property consented to jurisdiction.
2. ____. The bankruptcy court could adjudicate title and right to possession of the crane in the turnover proceeding but in that proceeding could not determine the amount due the trustee from the defendant under lease because the defendant did not consent to the summary jurisdiction of the bankruptcy court.
3. ____. Where an agreement has been fully performed by one party and the only performance due from the other is payment, the contract is no longer "executory" as that term is used in the Bankruptcy Act.

Appeal from the District Court for Lancaster County: HERBERT A. RONIN, Judge. Affirmed.

J. L. Krause for appellant.

Michael G. Helms of Schmid, Ford, Mooney & Frederick for appellee.

Heard before KRIVOSHA, C.J., BOSLAUGH, MCCOWN, BRODKEY, WHITE, and HASTINGS, JJ.

BOSLAUGH, J.

This case arises out of a controversy concerning a construction crane leased to the defendant, E. O. Peters, Inc., by Interstate Machinery & Supply Company. The written lease agreement provided for a rental of $5,000 per month. The lease was entered into on July 29, 1977, while Interstate was in reorganization proceedings under Chapter XI of the Bankruptcy Act.

On October 26, 1977, Interstate was adjudicated a bankrupt in involuntary proceedings and Merle Nicola,

the plaintiff, was appointed as trustee. In April of 1978 the trustee commenced summary proceedings in the bankruptcy court to recover possession of the crane. On September 29, 1978, the bankruptcy court issued a turnover order and the trustee took possession of the crane on October 11, 1978.

The lease terminated by operation of law on April 26, 1978, under Bankr. Act § 70 (b) and Rule 607, 11 U.S.C. § 110 (b) (1976), because the lease was not specifically assumed by the trustee. This action was commenced on October 20, 1978, to recover the rental due under the lease to April 26, 1978, and the fair and reasonable rental value of the crane after that date. The jury returned a verdict for the plaintiff in the amount of $44,333.33 on the first cause of action, and $17,600 on the second cause of action. The defendant has appealed.

The defendant's principal contentions are that the trial court erred in failing to sustain its various motions to dismiss on the ground the action was barred by res judicata because of the earlier turnover proceeding in the bankruptcy court; in excluding evidence of the failure of the trustee to give notice to the defendant of the subsequent sale of the crane; and in permitting the trustee to sue on a lease that had been rejected.

As to the res judicata defense, the critical question is whether the issues litigated in this action could have been presented and determined in the summary proceeding in the bankruptcy court. The question is determined by the scope of the bankruptcy court's jurisdiction in the turnover proceeding.

In the turnover proceeding, the trustee sought only the return of the property which was properly a part of the bankrupt's estate. Prior to October 1, 1979, before the 1978 Bankruptcy Act took effect, the bankruptcy court had summary jurisdiction over controversies with respect to property passing to the trustee under the act when the property was within the actual or constructive possession of the bankruptcy court or when the adverse claimant to the property consented to juris-

diction. *In re Warren*, 387 F. Supp. 1395 (S.D. Ohio 1975). Although the bankruptcy court had summary jurisdiction to adjudicate title to a cause of action, for example, it did not, absent consent, have summary jurisdiction to enforce the chose in action against the party liable thereon. *Id.* at 1400. Thus, the bankruptcy court could take summary jurisdiction to determine the title and right to possession of the crane if the court determined it had constructive possession of the property. This the court did when it determined that the defendant's claim to the crane was colorable only.

An adversary proceeding to determine the amount the defendant owed the trustee under the lease would necessarily involve the plenary jurisdiction of a court. Summary jurisdiction could determine the issue only if the defendant consented to its exercise. The record shows the defendant resisted the summary jurisdiction of the bankruptcy court in the trustee's suit and alleged that "the sole remedy of the Trustee is a separate and independent suit in State Court against Defendant."

In the absence of a consent to summary jurisdiction by the defendant, the trustee could not get a money judgment in the summary turnover proceeding. *In re Guillotine Splicer Corp.*, 2 B.R. 306 (Bankr. Ct. E.D.N.Y. 1980). In that case the court said at 307-08: "The United States Supreme Court in *Maggio v. Zeitz*, 333 U.S. 56, 68 S.Ct. 401, 92 L.Ed. 476 (1948), defined the parameters of the Bankruptcy Court's jurisdiction to issue a turn-over order. In *Maggio* the Court stated:

"'In applying these grants of power, courts of bankruptcy have fashioned the summary turnover procedure as one necessary to accomplish their function of administration. It enables the court summarily to retrieve concealed and diverted assets or secreted books of account the withholding of which, pending the outcome of plenary suits, would intolerably obstruct and delay administration. When supported by "clear and convincing evidence," the turnover order has been sustained as an

appropriate and necessary step in enforcing the Bankruptcy Act. *Oriel v. Russell*, 278 U.S. 358, 49 S.Ct. 173, 73 L.Ed. 419; *Cooper v. Dasher*, 290 U.S. 106, 54 S.Ct. 6, 78 L.Ed. 203. See also *Farmer's & Mechanics' National Bank v. Wilkinson*, 266 U.S. 503, 45 S.Ct. 144, 69 L.Ed. 408.

"'But this procedure is one primarily to get at property rather than to get at a debtor. Without pushing the analogy too far, it may be said that the theoretical basis for this remedy is found in the common law actions to recover possession — detinue for unlawful detention of chattels and replevin for their unlawful undertaking — as distinguished from actions in trespass or trover to recover damages for the withholding or for the value of the property. Of course the modern remedy does not exactly follow any of these ancient and often overlapping procedures, but the object — possession of specific property — is the same. The order for possession may extend to proceeds of property that has been disposed of, if they are sufficiently identified as such. But it is essentially a proceeding for restitution rather than indemnification, with some characteristics of a proceeding in rem; the primary condition of relief is possession of existing chattels or their proceeds capable of being surrendered by the person ordered to do so. It is in no sense based on a cause of action for damages for tortious conduct such as embezzlement, misappropriation or improvident dissipation of assets.'

. . . .

"The trustee is actually seeking a money judgment against the defendant. However, unless the defendant consents to the jurisdiction of this Court, this Court lacks the jurisdiction to render a money judgment in this proceeding." (Emphasis omitted.)

In *In re 671 Prospect Avenue Holding Corporation*, 118 F.2d 453, 454 (2d Cir. 1941), the court stated: "The existence of liability for damages caused by breach of contract or by tort must ordinarily at least be established by plenary suit, even though the plaintiff be a

trustee in bankruptcy. . . . This court said that the trustee could summarily recover possession of such specific property of the bankrupt as was still of the appellant's land, and 'in a proper proceeding' could recover the value of such property as the appellant had carted away or converted. We think it clear that by 'a proper proceeding' was meant a plenary suit."

Since the bankruptcy court had no jurisdiction in the summary turnover proceeding to determine the amounts due the trustee from the defendant under the lease, the turnover proceeding was not a bar to this action.

The defendant's contention that the trustee was required to give notice to the defendant of the subsequent sale of the crane is based on his theory that the lease was intended as security and was within the scope of Neb. U.C.C. art. 9 (Reissue 1971). This in turn depended upon the defendant's theory that the lease contained an option for the defendant to purchase the crane.

The lease itself, which was a fully integrated agreement, contained no option to purchase. See *Burhoop v. Pegram*, 194 Neb. 606, 234 N.W.2d 828 (1975). Instruction No. 7 by the trial court to that effect was correct.

Although there had been some negotiations between the defendant and Interstate prior to the execution of the lease, the defendant had no option to purchase because the parties failed to agree upon a price. This matter was an issue in the turnover proceeding and was decided adversely to the defendant. The issue was within the jurisdiction of the bankruptcy court and the prior adjudication was binding on the defendant.

The defendant's theory that the trustee could not sue on a rejected lease was based on an incorrect view of the effect of the rejection. The lease terminated on April 26, 1978, because the trustee did not specifically assume the lease. This terminated the defendant's liability for future rent under the lease but did not affect his obligation for rent that had accrued up to the date of

termination. The lease was executory only as to rental payments becoming due after April 26, 1978. Where an agreement has been fully performed by one party and the only performance due from the other is payment, the contract is no longer "executory" as that term is used in the Bankruptcy Act. *In the Matter of Computer Utilization, Inc.*, 508 F.2d 673 (5th Cir. 1975); *In Re Forney*, 299 F.2d 503 (7th Cir. 1962); *In Re San Francisco Bay Exposition*, 50 F. Supp. 344 (N.D. Cal. 1943).

Since the defendant failed and refused to return the crane until it was recovered by the trustee on October 11, 1978, the defendant was liable for the reasonable rental value of the crane between April 26, 1978, and October 11, 1978.

We have examined the defendant's other assignments of error and find that they are without merit.

The judgment of the District Court is affirmed.

AFFIRMED.

ELMER R. GOCHENOUR, APPELLANT, V. JERRY J. BOLIN ET AL., APPELLEES.

303 N.W.2d 775

Filed March 27, 1981. No. 43267.

1. **Statutes: Sentences.** 1975 Neb. Laws, L.B. 567, made no changes in the provisions for consolidation of consecutive sentences and the pertinent provisions of Neb. Rev. Stat. § 83-1,110 (2) (Reissue 1976) pertaining to consolidation are to be applied to consecutive sentences whether imposed before or after the effective date of L.B. 567.
2. **Board of Pardons: Statutes: Sentences.** Our holding in *Johnson & Cunningham v. Exon*, 199 Neb. 154, 256 N.W.2d 869 (1977), that approval of the Board of Pardons was required to apply L.B. 567 retroactively pertained only to those changes in the statute which would result in discharge from custody of the prisoner at an earlier date than before the amendments made by L.B. 567.

Appeal from the District Court for Lancaster County: HERBERT A. RONIN, Judge. Affirmed in part and remanded for further proceedings if they be requested.

Dennis R. Keefe, Public Defender, and Richard L. Goos for appellant.

Paul L. Douglas, Attorney General, and J. Kirk Brown for appellee.

Heard before KRIVOSHA, C.J., BOSLAUGH, MCCOWN, CLINTON, BRODKEY, WHITE, and HASTINGS, JJ.

CLINTON, J.

This is an action brought by Elmer R. Gochenour, an inmate of the Nebraska Penal and Correctional Complex, in the District Court for Lancaster County for a declaratory judgment construing the statutes of this state providing for "good time" and to determine whether the Department of Correctional Services (hereinafter DCS) properly computed Gochenour's discharge date. The petition alleged that the DCS unlawfully interrupted his service of an indeterminate sentence for the purpose of having him serve a consecutive sentence subsequently imposed before completing the indeterminate sentence. The petition further alleged that his primary and consecutive sentences were not consolidated in accordance with the provisions of Neb. Rev. Stat. § 83-1,110(2) (Reissue 1976). The petition asks for a declaration that such procedures are unlawful.

The District Court made certain findings and then entered an order as follows:

"THEREFORE, IT IS ORDERED:

"1. The plaintiff must serve his original 3 to 5 year sentence until it has been served in full and he has been discharged therefrom under the statutes in effect at the time of that conviction.

"2. When the plaintiff begins serving his consecutive sentence, he shall receive credit against that sentence for time served from June 4, 1979 to the effective date of this order."

The order was entered on January 15, 1980. Gochenour then appealed to this court.

A simple and clear explanation of the source of the

controversy is not readily accomplished. The problems arise from changes made in the "good time" statutes as well as our holding in *Johnson & Cunningham v. Exon*, 199 Neb. 154, 256 N.W.2d 869 (1977), interpreting 1975 Neb. Laws, L.B. 567, which made the statutory changes.

We will first set forth the facts from which the dispute arises and then explain the statutory changes.

On May 15, 1975, Gochenour began serving a term of 3 to 5 years for forgery. On May 6, 1977, he escaped and was not apprehended until March 3, 1978, 9 months and 27 days after his escape. He was prosecuted for the escape, found guilty, and, on March 3, 1978, sentenced to a term of 1 year to be served consecutively to the previous sentence. Because of his escape he lost, by administrative action, all accumulated good time as permitted by statute. Later, his good time on the 1975 sentence was administratively restored and on January 1, 1979, the DCS established for him a mandatory parole date of June 4, 1979, for the first sentence. This was apparently done under the provisions of Neb. Rev. Stat. §§ 83-1,107(1)(b) and 83-1,111(5) (Reissue 1976) as those statutes provided before their amendment by L.B. 567. L.B. 567 became effective 3 months after May 23, 1975.

On June 4, 1979, he was not released to serve on parole the remainder of his first sentence; rather, that sentence was "interrupted" and he began to serve the 1-year consecutive sentence. On October 2, 1979, he commenced this action.

We now examine the pertinent statutes and the changes made by L.B. 567. At the time of the imposition of the first sentence and at the time the consecutive sentence was imposed, § 83-1,110 provided, in effect, that consecutive sentences be consolidated and that every committed offender sentenced to serve a consecutive sentence, whether the sentences were received at the same time or during the original sentence, would be eligible for release on parole when he had served the total of the *minimum terms* less good time as provided

by the statutes. § 83-1,107. Section 83-1,110 also provided that "[t]he maximum terms shall be added to compute the new maximum term." The prisoner was eligible for *mandatory parole* when he had served the maximum term less good time reductions. § 83-1,107.

L.B. 567 did not make any change in the provisions of the statute for consolidation of sentences. It did, however, make changes with reference to "good time."

Statutes, at the time Gochenour received his first sentence, provided for two types of good time which we will refer to as "good behavior" and "meritorious" good time (although the terminology was changed by L.B. 567). Before L.B. 567 took effect, good time credit of both types was deducted from the minimum terms to determine *eligibility* for release on parole, and from the maximum terms to determine when release on parole became *mandatory.*

When L.B. 567 became effective in August 1975 it made the following changes in how good time reductions were treated. "Good behavior" time but not meritorious time was now deducted from the minimum term to determine eligibility for release on parole as well as from the maximum term to determine when the *discharge from custody* of the state became mandatory. L.B. 567 § 2. The reductions were to be credited from the date of sentence. Meritorious good time was credited only against the maximum term to determine when *discharge from custody* became mandatory.

The effect of these changes would be that in some instances *discharges from custody* would come at an earlier date.

Section 9 of L.B. 567 provided in part: "Any person eligible for immediate discharge or release pursuant to this act shall be so discharged or released no later than one hundred twenty days after the effective date of this act subject to the approval of the Board of Pardons."

The Legislature, apparently through oversight, made no specific provision as to how reductions granted for one purpose under previous law were to be blended with

reductions granted under L.B. 567 for a different purpose.

Johnson & Cunningham v. Exon, 199 Neb. 154, 256 N.W.2d 869 (1977), was an action by two inmates of the Nebraska Penal and Correctional Complex who, it was stipulated, were eligible for mandatory release if L.B. 567 were applied retroactively. We held in that case that, if L.B. 567 was applied so as to give inmates eligible for immediate release the benefit of the bill and not to benefit those who became eligible for later release, it would create a discriminatory classification and also violate the equal protection clause of our Constitution. We, therefore, interpreted the act to apply not only to inmates eligible for immediate release but those becoming eligible later under the terms of the act, provided in each case the approval of the Board of Pardons was received as provided by section 9 of L.B. 567. This interpretation negated the State's contention that retroactive application constituted a commutation of sentence and thus violated the constitutional powers of commutation vested in the executive branch of government. Neb. Const. art. IV, § 13.

The record before us does not establish that approval of the Board of Pardons has been received for retroactive application in this case. The record shows that Gochenour had hearings before the Board of Parole on May 11, 1978, May 11, 1979, and September 10, 1979, and that action was deferred in each instance.

In *Johnson & Cunningham v. Exon, supra*, we painted with a rather broad brush and we believe that has led to some misconception as to its holding. That decision can be properly interpreted only in the light of the facts in that case where it was stipulated that the petitioners become eligible for earlier discharge because of the *changes* in the statutes. Our holding, that failure to apply L.B. 567 retroactively would result in discriminatory classifications and denial of equal protection, patently pertained only to those changes in the statute which would result in earlier release than under existing laws.

The provisions for consolidation of consecutive sentences were not in any way changed. Those provisions are to be applied whether sentencing was before or after the effective date of L.B. 567. That appears not to have been done in this case. In sum, after the imposition of the 1-year consecutive sentence, its consolidation with the 3- to 5-year indeterminate sentence resulted in a 4- to 6-year consolidated term and should have been so treated. The approval of the Board of Pardons was not sought or received in this case, so the pre-L.B. 567 good time provisions should have been applied. Because Gochenour had hearings before the Board of Parole on May 11, 1978, May 11, 1979, and September 10, 1979, and early parole was denied, he has not been hurt with reference to the date he became *eligible for parole* for that date obviously occurred later because of the consolidation of sentences. His mandatory parole date also obviously occurred at a date later than June 4, 1979, determined by the DCS — 8 months later if no good time of any kind was forfeited and he earned the maximum meritorious time.

The State argues that if the DCS cannot interrupt a sentence for the purpose of having a consecutive term served, it might result in some instances, where early parole is granted, in having to retrieve the person when parole has been served and then reincarcerating him for the purpose of serving the consecutive sentence. That would not appear to be true if the statutes on consolidation are followed.

The DCS had no authority to interrupt the first sentence for the purpose of serving the second. No such authority appears in the statutes and it is apparently not an inherent power. See *Perkins v. Peyton*, 369 F.2d 590 (4th Cir. 1966).

We cannot compute any of the pertinent dates because the record does not contain information as to whether good time may have been forfeited after the period covered by the record in this case ends.

AFFIRMED IN PART AND REMANDED FOR FURTHER PROCEEDINGS IF THEY BE REQUESTED.

STATE OF NEBRASKA, APPELLEE, V. DARRELL E. HATWAN, APPELLANT.

303 N.W.2d 779

Filed March 27, 1981. No. 43397.

1. **Assault: Words and Phrases.** A dangerous instrument within the meaning of Neb. Rev. Stat. § 28-309 (Reissue 1979) is any instrumentality which, because of its nature and the manner and intention of its use, is capable of inflicting bodily injury, and need not be an instrument which is inherently dangerous and capable of inflicting injury.
2. ____: ____. The infliction of *serious* bodily injury is not a necessary element of assault in the second degree as defined by Neb. Rev. Stat. § 28-309(1)(a) (Reissue 1979). Neither is it an element of third degree assault under Neb. Rev. Stat. § 28-310 (Reissue 1979).
3. **Assault: Sentences.** Where an accused is convicted of both second and third degree assault, it is not necessarily an abuse of discretion to impose a more severe sentence for the lesser assault than that imposed for the greater.

Appeal from the District Court for Lincoln County: HUGH STUART, Judge. Affirmed.

Murphy, Pederson, Piccolo & Anderson for appellant.

Paul L. Douglas, Attorney General, Mel Kammerlohr, and Cheryl A. Netz for appellee.

Heard before KRIVOSHA, C.J., BOSLAUGH, MCCOWN, CLINTON, BRODKEY, WHITE, and HASTINGS, JJ.

CLINTON, J.

The defendant, Darrell E. Hatwan, was charged in two counts with assault in the second degree. During the course of the pretrial proceedings, count I was reduced to third degree assault. Hatwan waived his right to a jury trial and consented to a trial before the court. He was found guilty by the court on both counts and sentenced to a term of 6 months in the county jail on the third degree assault charge and to 4 months in the county jail on the second degree charge, the terms to run concurrently. He has appealed to this court and makes the following assignments of error: (1) The trial court erred in finding that the second degree assault

was committed with the use of a dangerous weapon, that being an essential element of the crime. (2) The trial court erred in imposing a more severe sentence on the lesser charge than that imposed for the greater. (3) A new trial should have been granted because the defendant was represented during trial by inadequate, incompetent counsel. (4) The court erred in finding the defendant guilty of the second degree assault charge because there was no evidence that the victim suffered "serious bodily injury." The defendant's assignments are without merit and we affirm.

An understanding of the assignments requires that we examine the statutes defining the crimes charged and the evidence tending to support the State's case. Assault in the second degree is defined by Neb. Rev. Stat. § 28-309 (Reissue 1979) as follows: "(1) A person commits the offense of assault in the second degree if he:

"(a) Intentionally or knowingly causes bodily injury to another person with a dangerous instrument; or

"(b) Recklessly causes serious bodily injury to another person with a dangerous instrument."

Assault in the third degree is defined by Neb. Rev. Stat. § 28-310 (Reissue 1979): "(1) A person commits the offense of assault in the third degree if he:

"(a) Intentionally, knowingly, or recklessly causes bodily injury to another person; or

"(b) Threatens another in a menacing manner."

Second degree assault is a Class IV felony; third degree assault, as charged in this case, is a Class II misdemeanor.

The defendant, Hatwan, on the date of the alleged offenses, was a lodger in the Uptown Motel in North Platte, Nebraska, which was then operated by Mina DeVriendt and her husband, A. E. DeVriendt. Hatwan, at the time of the offenses, was 42 years old, 6 feet tall, and weighed 175 pounds. Mrs. DeVriendt, the victim of the third degree assault, was 71 years old, 5 feet 4½ inches tall, and weighed 145 pounds. Her husband was

74 years old, 5 feet 8 inches in height, and weighed about 145 pounds.

The victim's version of the crime charged was that Hatwan came into the motel lobby at about 10:15 p.m. Mrs. DeVriendt heard him enter and went into the lobby from the couple's adjacent living quarters. Hatwan made a remark to her which indicated he had been assaulted or in a fight in a bar. He then claimed that he had been overcharged for his room at the motel. When Mrs. DeVriendt attempted to explain the room rate structure, he became loud and abusive. Mr. DeVriendt then entered the lobby.

As Mr. DeVriendt attempted to explain the room rates, Hatwan declared that he had not been given a receipt. Mr. DeVriendt told him to forget about it, he would write out a receipt that would show him paid through that night. He then wrote out the receipt and offered it to Hatwan.

After the receipt was written out, Mrs. DeVriendt felt they were in trouble and reached for the telephone behind the counter. Hatwan reached over the counter, grabbing the telephone receiver with one hand and grabbing Mrs. DeVriendt by the hair of her head with the other. He then threw Mrs. DeVriendt to the floor and jerked the telephone cord and receiver away from the telephone. He stepped back and began slinging the telephone receiver around his head. Mr. DeVriendt was then struck on the side of the head with the receiver, splitting his ear open.

Hatwan grabbed Mr. DeVriendt and threw him against the front of the office and then grabbed him a second time, throwing him into the corner against the south windows of the lobby.

Mrs. DeVriendt got up and came around from behind the counter. Hatwan knocked her down. She then crawled on her hands and knees into the corner, sitting next to her husband. Hatwan left shortly thereafter and Mrs. DeVriendt then called the police.

Hatwan denied the version as related by the

DeVriendts. He claimed the DeVriendts had attacked him and that the DeVriendts' injuries were suffered when DeVriendt fell while Hatwan was defending himself. The details of his testimony are not important since the trial court resolved the evidentiary conflicts against the accused.

We now examine the assignments of error in the order in which they were made. The court apparently found that with reference to the second degree charge, the telephone receiver was, in the manner in which it was used, a dangerous instrument within the meaning of the statute. The defendant argues that a dangerous instrument is only one which, by its very nature, is able or likely to inflict injury and includes such objects as guns, knives, axes, razors, and other instruments of like nature. He, therefore, argues that without regard to the mode of use, the telephone receiver cannot be a dangerous instrument, hence, the evidence did not support the conviction. He relies upon the dictionary definition of the two terms. We quote from his brief.

"An *'instrument'* is defined in Webster's Seventh New Collegiate Dictionary (1965) as a tool, utensil or implement. The word *'dangerous'* is likewise defined as something which is able or likely to inflict injury. Thus, a dangerous instrument is a tool or implement which is able to or likely to inflict injury. Examples of a dangerous instrument would be guns, knives, axes, razors, etc.

"The word 'instrument' is extremely broad in its definition and conceivably could include any object which is capable of being held by a person. However, not all *instruments* which are used in an assault case qualify as a *dangerous* instrument. The broad definition of instrument is limited by the term *'dangerous'*, which serves to qualify and restrict the tools or implements which are within the meaning of § 28-309. By its very nature, the tool, utensil or implement must be dangerous to be within the meaning of the statute. Therefore,

a *dangerous* instrument can only be one which by its very nature is able or likely to inflict injury." He cites no legal precedents directly in point.

Our criminal code does define the term deadly weapon, but it does not define the term dangerous instrument. Neb. Rev. Stat. § 28-109(7) (Reissue 1979). Neither, apparently, has this court had occasion to define the term dangerous instrument as it is used in the statutes in question. There are, however, jurisdictions in which the term "deadly or dangerous weapon" is a term used in statutes defining various crimes. In many of the cases invoking such terms, the courts have said they include not only instruments such as guns or knives but also other instrumentalities which, because of the manner of their use and the intention with which they are used, are dangerous. Some such cases are *Cummings v. State*, 384 N.E.2d 605 (Ind. 1979) (stapler used as a bludgeon); *Bald Eagle v. State of Oklahoma*, 355 P.2d 1015 (Okla. Crim. 1960) (beer bottle used as a weapon); *Berfield v. State*, 458 P.2d 1008 (Alaska 1969) (boots on feet used to kick face and head of victim). One case almost precisely in point is that of *Thomas v. State*, 524 P.2d 664 (Alaska 1974), where it was held that a telephone used as a club was a dangerous weapon.

In the case before us, the evidence accepted by the trier of fact indicated that the telephone receiver was intentionally swung by the attached cord in such a manner as to intentionally cause bodily injury. The physical principle involved in such use is essentially the same as that which David used when he killed Goliath. We hold that a dangerous instrument within the meaning of § 28-309 is any object which, because of its nature and the manner and intention of its use, is capable of inflicting bodily injury. It might, for example, be a piece of lumber, a hammer, or many other physical objects.

The defendant next contends that the evidence is insufficient to sustain the charge under § 28-309 because

Mr. DeVriendt, who was the victim of the second degree assault, received no serious bodily injury. We simply point out that the second degree assault here charged was, by the language of the information, brought under § 28-309 (1) (a). Causing serious bodily injury is not an element of the crime under that subsection of the statute.

We now turn to the claim that the court abused its discretion in imposing a larger sentence on the third degree assault than on the second degree assault. Second degree assault is a Class IV felony and is punishable by a maximum term of 5 years' imprisonment or a $10,000 fine, or both. No minimum sentence is specified. Neb. Rev. Stat. §§ 28-309 and 28-105 (Reissue 1979). Third degree assault, as charged in this case, is a Class II misdemeanor. Neb. Rev. Stat. §§ 28-310 and 28-106 (1) (Reissue 1979). The maximum punishment is 6 months' imprisonment or $1,000 fine, or both. Again, no minimum sentence is specified. Thus the defendant received the maximum sentence on the misdemeanor charge and a relatively light sentence on the felony charge. Because the sentences are concurrent, the defendant has not been hurt even if we were convinced that the alleged "disparity" was an abuse of discretion. We do not so regard it. Many penologists and learned persons who have written on crime and punishment point out that one of the justifications for punishment and, indeed, of the penal codes themselves is to express society's disapproval of the violation of its accepted moral standards. The victim of the misdemeanor charge in this case was a small, elderly woman. The assault was by a strong, young man. Most of mankind would regard this circumstance as an aggravating factor.

The defendant's attack on the competency of counsel is premised on the trial counsel's failure to subpoena hospital records and to call as witnesses medical personnel who attended the victims. The purpose of such evidence would have been to show that the victims

did not suffer "serious bodily injury." We have already pointed out that under §§ 28-309(1)(a) and 28-310 (1)(a) the infliction of serious bodily injury is not an element of the crime. The evidence disclosed that the victims did suffer bodily injury. Whether it was serious or not was immaterial to the proof of the charges. The claim of incompetence of counsel on this score is not supported by the record.

AFFIRMED.

NORESE MEYSENBURG, APPELLANT, V. GARY MEYSENBURG, APPELLEE.

303 N.W.2d 783

Filed March 27, 1981. No. 43428.

1. **Divorce: Child Custody.** Above all other considerations in determining the question of who should have custody of a minor child upon the dissolution of a marriage, the paramount consideration is the best interests and welfare of the child.
2. **Divorce: Appeal and Error.** We review the record de novo, giving due regard to the trial court which had the opportunity to observe the witnesses.
3. **Child Support: Appeal and Error.** A decision on the amount to be awarded as child support rests in the sound discretion of the trial court and will not be disturbed on appeal unless it appears that the court abused its discretion.

Appeal from the District Court for Douglas County: ROBERT V. BURKHARD, Judge. Affirmed.

Walter J. Matejka for appellant.

James W. Moriarty for appellee.

Heard before KRIVOSHA, C.J., BOSLAUGH, MCCOWN, BRODKEY, WHITE, and HASTINGS, JJ.

PER CURIAM.

The appellant, Norese Meysenburg, appeals from an order entered by the District Court for Douglas County,

Nebraska, awarding physical custody of the minor child of Norese Meysenburg and her former husband, Gary Meysenburg, to Gary Meysenburg, subject to further review by the court in 6 months from the date of the decree. She further appeals from the same order which also required her to pay $80 per month child support toward the support of the parties' minor child. For reasons which we will more carefully detail hereinafter, we affirm the judgment of the trial court.

The record discloses that Norese Meysenburg and Gary Meysenburg were married on April 5, 1979, in Omaha, Nebraska. During the marriage one child was born to the parties, Chad Meysenburg, born June 20, 1979. Norese was, at the time of trial, 19 years old and employed as a nurse's aide at Methodist Hospital in Omaha, Nebraska. She was a high school graduate and was earning $4.06 per hour at the hospital. She resided with her parents, her brother, and a sister in her parents' home in Omaha, Nebraska.

Gary Meysenburg was, at the time of trial, 21 years of age, a high school graduate, and employed by Werner Paint Company, earning $135 per week. He, likewise, resided with his parents at his parents' home in Omaha, Nebraska.

The record indicates without contradiction that both mother and father love their child and desire to be the principal parent to raise the child, though each of them would require assistance from their respective parents due to the fact that both are employed. The rules with regard to matters of this type are easy to pronounce but extremely difficult to apply. Above all other considerations in determining the question of who should have custody of a minor child upon the dissolution of a marriage, the paramount consideration is the best interests and welfare of the child. See, Neb. Rev. Stat. § 42-364 (Reissue 1978); *Boyles v. Boyles*, 191 Neb. 66, 213 N.W.2d 729 (1974).

Norese urges us to find that the best interests and welfare of a child are served by awarding custody to the

natural mother. Whatever may have once been the view with regard to this matter, it is now clear that where the issue of child custody is involved both the mother and father have an equal and joint right to the custody of their children. The test for determining custody, which has been reiterated by this court many times in recent years, is the best interests of the child. See *Theye v. Theye*, 200 Neb. 206, 263 N.W.2d 92 (1978).

Setting out all of the claims and counterclaims made by the parties to this action would serve little purpose. Nor would such a recitation give insight to litigants with regard to future matters or bring the parties together insofar as the future raising of their minor child is concerned. Suffice it to say that an investigative report was made in this case by the conciliation court counselor at the request of the trial court and submitted to the trial court. The report recommended that physical custody which had been granted temporarily to Gary should now be permanently granted to Gary, subject to further review by the District Court.

When one reads the entire record in this case, one must conclude that the decision by the trial court was supported by the evidence and does not in any manner indicate an abuse of discretion as urged by Norese. Norese argues that it is in the best interests of the child that he be placed with her and not with Gary. The evidence simply does not support that conclusion.

It may very well be that the best interests of Norese would support a claim that the child be placed with her. As we have already indicated, however, our principal concern is not the best interests of the mother but with the best interests of the child. We review the record de novo, giving due regard to the trial court which had the opportunity to observe the witnesses. After de novo review of the evidence, we conclude that it is in the best interests of the child that he remain in the custody of his father.

Having concluded that the trial court was not in error in awarding custody of Chad to Gary, we are, likewise,

unable to conclude that the trial court was in error in requiring Norese to participate in providing for the support of Chad. Nothing in the applicable statutes or case law indicates that a mother, not having custody of a minor child, may not be required to pay child support, and, in fact, the opposite applies. See § 42-364. The court is required to consider the earning capacity of each parent, together with other attendant circumstances. See, *Lynch v. Lynch*, 195 Neb. 804, 241 N.W.2d 123 (1976); *Hermance v. Hermance*, 194 Neb. 720, 235 N.W.2d 231 (1975). A decision on the amount to be awarded as child support rests in the sound discretion of the trial court and will not be disturbed on appeal unless it appears that the court abused its discretion. See *Sommers v. Sommers*, 191 Neb. 361, 215 N.W.2d 84 (1974).

Accordingly, we affirm the judgment of the trial court.

AFFIRMED.

EDDIE ADDISON, APPELLANT, V. ROBERT PARRATT, WARDEN, NEBRASKA PENAL AND CORRECTIONAL COMPLEX, APPELLEE.

303 N.W.2d 785

Filed March 27, 1981. No. 43611.

1. **Post Conviction: New Trial.** The ordering of a new trial by the trial court is an appropriate discretionary method of granting post conviction relief under Neb. Rev. Stat. § 29-3001 (Reissue 1979).
2. **Sentences: New Trial.** The fact that a defendant has served the full sentence imposed for a particular crime is not necessarily a bar to the granting of a new trial because of errors appearing in the earlier conviction.
3. **New Trial: Double Jeopardy.** The granting of a new trial because of errors occurring at the original trial does not necessarily constitute double jeopardy.
4. **Habitual Criminals: Sentences.** An enhanced sentence imposed under the provisions of the habitual criminal laws, Neb. Rev. Stat. §§ 29-2221

and 29-2222 (Reissue 1979), is not a new jeopardy or additional penalty for the same crime. It is simply a stiffened penalty for the latest crime which is considered to be an aggravated offense because it is a repetitive one.

5. **Habitual Criminals: Pleas.** Record examined and disclosed that pleas of guilty utilized to prove the defendant to be an habitual criminal, as well as his waiver of counsel, were entered freely, voluntarily, and knowingly.
6. **Sentences.** The crediting of prior jail time to a sentence imposed for the minimum sentence permitted by statute is discretionary with the sentencing judge.

Appeal from the District Court for Sheridan County: ROBERT R. MORAN, Judge. Affirmed.

Eddie Addison, pro se.

Paul L. Douglas, Attorney General, and Shanler D. Cronk for appellee.

Heard before KRIVOSHA, C.J., BOSLAUGH, MCCOWN, CLINTON, BRODKEY, WHITE, and HASTINGS, JJ.

HASTINGS, J.

This appeal consists of four different post conviction relief cases filed under the provisions of Neb. Rev. Stat. §§ 29-3001 et seq. (Reissue 1979), which, at the request of the defendant, were consolidated for trial in the District Court. The defendant, Eddie Addison, also known as Edison Clown Horse, who appeared pro se, has appealed the July 15, 1980, order of the trial court granting him post conviction relief in the one case and denying it in the other three.

The one case in which relief was granted was a sentence imposed by the District Court for Sheridan County for a term of 1 year in the Nebraska Penal and Correctional Complex, with credit being given for 102 days' prior jail time served by the defendant. Two of the cases in which relief was denied originated out of the District Court for Sheridan County, and the other one came from Dawes County. In all three of these cases the defendant was found to be an habitual criminal under the provisions of Neb. Rev. Stat. §§ 29-2221 and 29-2222 (Reissue 1979), and was sentenced to terms

of 10 years to run concurrently with each other but consecutively to the 1-year sentence case. The direct appeals in each of these cases may be found respectively at: 196 Neb. 768, 246 N.W.2d 213 (1976); 197 Neb. 482, 249 N.W.2d 746 (1977); 198 Neb. 166, 251 N.W.2d 895 (1977); and 198 Neb. 442, 253 N.W.2d 165 (1977).

Although the defendant does not assign any errors as such in his brief, it may be gathered from the argument portion that he complains of the following: (1) He should not have been awarded a new trial in the first case because he has already served more time than that for which he was sentenced; (2) That the habitual criminal statutes previously cited are void under the fifth amendment of the United States Constitution as having subjected him to double jeopardy; (3) That the findings that he was an habitual criminal were based upon pleas of guilty which were not voluntarily and knowingly made; and (4) That he was not given full credit for time spent in jail. We affirm the action of the District Court.

Most of the evidence presented by the defendant at the consolidated hearing had to do with defendant's claim of ineffective assistance of counsel. It was on the basis of that claim that the trial judge granted relief in the one case by ordering a new trial. Section 29-3001 provides in part as follows: "If the court finds that there was such a denial or infringement of the rights of the prisoner as to render the judgment void or voidable under the Constitution of this state or the Constitution of the United States, the court shall vacate and set aside the judgment and shall discharge the prisoner or resentence him or *grant a new trial* as may appear appropriate." (Emphasis supplied.) Even though it will be necessary to apply any time already served on this vacated sentence, in the event of a conviction on a retrial, he is not entitled to be insulated from prosecution on the now pending charge. If the defendant has committed the crime the State is entitled to seek his prosecution and conviction. The

proper crediting of any time served to date may be taken up in an appropriate proceeding. The trial court having determined that his conviction was void and having set the same aside, the defendant is not twice put in jeopardy for the same offense by being subjected to a retrial. *State v. Houp*, 182 Neb. 298, 154 N.W.2d 465 (1967); *Houp v. State of Nebraska*, 427 F.2d 254 (8th Cir. 1970), *cert. denied* 401 U.S. 924, 91 S. Ct. 887, 27 L. Ed. 2d 827. See, also, *Day v. State*, 76 Wis. 2d 588, 251 N.W. 2d 811 (1977); *United States v. Ball*, 163 U.S. 662, 16 S. Ct. 1192, 41 L. Ed. 300 (1896); *United States v. Dinitz*, 424 U.S. 600, 96 S. Ct. 1075, 47 L. Ed. 2d 267 (1976).

Contrary to the defendant's contention, an enhanced sentence under the provisions of the habitual criminal laws is not a new jeopardy or additional penalty for the same crime. It is simply a stiffened penalty for the latest crime which is considered to be an aggravated offense because it is a repetitive one. *Gryger v. Burke*, 334 U.S. 728, 68 S. Ct. 1256, 92 L. Ed. 1683 (1948). See, also, *Poppe v. State*, 155 Neb. 527, 52 N.W.2d 422 (1952), as holding generally that statutes which provide for enhanced penalties because of repetitive offenses are not violative of the Constitution.

One of the prior felonies used to enhance the sentence in these cases was *State v. Edison Clown Horse*, found as case No. 17321 in the District Court for Scotts Bluff County. Defendant in that case, who was identified as the same person as Eddie Addison, was sentenced on February 11, 1963, to 3 years for the felony offense of possessing a forged instrument. A certified copy of the journal entry recited that the defendant, although present without counsel, was advised of his right to counsel, his right to jury trial, and of the possible consequences of a guilty plea. The trial court further found that he waived his right to counsel and freely and voluntarily entered his plea of guilty. Another prior conviction utilized was found in the case of *State v. Edison Clown Horse*, case No. C-1181, District Court for Sheridan County, wherein the defendant was sen-

tenced on March 13, 1967, to a term of 2 years in the Nebraska Penal and Correctional Complex. Again, the record reveals that the defendant appeared without counsel, but he was advised of his right to have counsel and his right to a jury trial. The court determined that the defendant had not been induced or persuaded to enter a plea against his will and, with the consent of the court, tendered a plea of nolo contendere. The other conviction used in all three cases involving habitual criminal charges was one entitled *State of South Dakota v. Eddie Addison, also known as Edison Clown Horse*, case No. 4479, Circuit Court of Pennington County, South Dakota. In that case, the defendant was sentenced to a term of 4 years in the South Dakota State Penitentiary. The amended judgment indicates that defendant had been represented by counsel and, after having been tried by a fair and impartial jury, was found guilty of third degree forgery. Defendant's contention that his previous convictions were in any way tainted is wholly refuted by the record.

The only suggestion that any jail time was not credited to the defendant consisted of a pair of letters between the Department of Correctional Services and the Sheridan County attorney. No conclusion can be drawn from that exchange of correspondence which would refute the positive determination made by the trial court that proper credit was given for all appropriate time served. However, in any event, the decision to grant credit for jail time rests in the sound discretion of the sentencing judge. "(1) Credit against the maximum term and any minimum term *may be given* to an offender for time spent in custody as a result of the criminal charge . . . ." (Emphasis supplied.) Neb. Rev. Stat. § 83-1,106 (Reissue 1976).

We conclude that the action taken by the District Court was proper in all respects, is supported by the record, and its order is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. OTIS L. ROGERS, APPELLANT.

303 N.W.2d 788

Filed March 27, 1981. No. 43691.

1. **Right to Counsel: Waiver.** An accused may waive his right to counsel where such waiver is made intelligently and understandingly, with knowledge of the right to counsel.
2. **Right to Counsel: Waiver: Proof.** The defendant has the burden of proving nonwaiver and he must show by a preponderance of the evidence that he did not intelligently and understandingly waive that right.
3. **Right to Counsel.** One may insist upon representing himself no matter how foolhardy that decision is, if made knowingly and intelligently; and once that decision is made, the individual making that choice must accept the consequences of his election.

Appeal from the District Court for Douglas County: JAMES M. MURPHY, Judge. Affirmed.

Lynn R. Carey, Jr., for appellant.

Paul L. Douglas, Attorney General, and Terry R. Schaaf for appellee.

Heard before KRIVOSHA, C.J., BOSLAUGH, MCCOWN, CLINTON, BRODKEY, WHITE, and HASTINGS, JJ.

KRIVOSHA, C.J.

The appellant, Otis Rogers (Rogers), appeals from a verdict entered by a jury finding Rogers guilty of two counts of burglary. Rogers maintains that the trial court committed reversible error in allowing Rogers to waive counsel without determining said waiver to have been intelligently made. We believe that the assignment is without merit and affirm the judgment of the trial court.

The record discloses that counsel had been previously appointed for Rogers but was granted leave to withdraw on March 17, 1980, and new counsel was then appointed. The case was called to trial on April 7, 1980. At that time Rogers indicated to the trial court his desire for a privately selected attorney, his dissatisfaction with appointed counsel, and his refusal to accept court-

appointed counsel. The privately selected counsel sought by Rogers was apparently never employed by Rogers and did not appear at trial. The trial court permitted the second court-appointed counsel to withdraw at Rogers' request, but ordered him to remain in the courtroom for the purpose of assisting Rogers whenever such assistance was required. The record further discloses that, in fact, court-appointed counsel did assist Rogers in certain aspects of the trial, including aiding by securing the presence of witnesses requested by Rogers. Rogers maintains that because he was a 72-year-old cantankerous individual who refused to accept or get along with two previously appointed lawyers, the court should not have permitted him to go to trial without counsel. While the brief raises the question of whether Rogers was competent to stand trial, counsel for Rogers, at the time of oral argument before this court, conceded that Rogers was not incompetent to stand trial but only incompetent to make a voluntary waiver of counsel. Furthermore, the record does not support a claim that Rogers was incompetent to stand trial but, in fact, was competent. See *State v. Guatney*, 207 Neb. 501, 299 N.W.2d 538 (1980).

The record further does not support the claims made by Rogers even as to his inability to knowingly and intelligently waive counsel. It is true, indeed, that Rogers was 72 years of age and his behavior would disclose that he was cantankerous. The balance of the claims made by Rogers as to his mental condition rendering him unable to make an intelligent or knowing waiver of counsel are wholly unsupported in the record. An examination conducted by the State following the jury verdict and prior to sentencing indicated that, due to acute alcoholism, Rogers did suffer from some organic brain damage manifested by impaired judgment and impaired emotional stability. He did, however, know who he was and where he was and what he was generally doing. The general rule is that an accused may waive his right to counsel where such waiver is made intel-

ligently and understandingly, with knowledge of the right to counsel. *State v. Morford*, 192 Neb. 412, 222 N.W.2d 117 (1974). The defendant has the burden of proving nonwaiver and he must show by a preponderance of the evidence that he did not intelligently and understandingly waive that right. See, *North Carolina v. Butler*, 441 U.S. 369, 99 S. Ct. 1755, 60 L. Ed. 2d 286 (1979); *Moore v. Michigan*, 355 U.S. 155, 78 S. Ct. 191, 2 L. Ed. 2d 167 (1957); *Johnson v. Zerbst*, 304 U.S. 458, 58 S. Ct. 1019, 82 L. Ed. 1461 (1938). One may insist upon representing himself no matter how foolhardy that decision is, if made knowingly and intelligently; and once that decision is made, the individual making that choice must accept the consequences of his election. See, *Marchand v. Gene Thorpe Finance, Inc.*, 225 So. 2d 485 (La. App. 1969); *Viles v. Scofield*, 128 Colo. 185, 261 P.2d 148 (1953). "There is no reason he should not be held responsible for the inept counsel he freely chose even though that counsel was himself." *State v. Baker*, 201 Neb. 579, 581, 270 N.W.2d 922, 924 (1978).

The record herein is totally devoid of any evidence of his not understanding what he was doing when waiving counsel. As a matter of fact, the record shows that Rogers was clearly aware of what he was doing and the consequences of his act. Rogers knew who had been appointed to represent him and what the effect of discharging counsel and representing himself meant. He subpoenaed witnesses, examined and cross-examined witnesses, and made closing argument. It was not successful simply because the evidence of guilt, including his own confession, was too great.

Finding no error, we believe the judgment should be affirmed.

AFFIRMED.

LARON L. WRIGHT, APPELLANT, V. STATE OF NEBRASKA EX REL. STATE REAL ESTATE COMMISSION OF THE STATE OF NEBRASKA, APPELLEE.

304 N.W.2d 39

Filed April 3, 1981. No. 43215.

1. **Brokers' Licenses.** Real estate licenses shall be granted only to persons who bear a good reputation of honesty, trustworthiness, integrity, and competence to transact the business of broker or salesman in such manner as to safeguard the interests of the public, and only after satisfactory proof of such qualifications has been presented to the commission. Neb. Rev. Stat. § 81-885.12 (Reissue 1976).
2. **Brokers' Licenses: Revocation.** The State Real Estate Commission may, upon its own motion, and shall, upon the sworn complaint in writing of any person, investigate the actions of any broker and shall have power to revoke or suspend any license or certificate issued under Neb. Rev. Stat. §§ 81-885.01 to 81-885.47 (Reissue 1976) whenever the license or certificate has been obtained by false or fraudulent representation or the licensee or certificate holder has been found guilty of the following unfair trade practice, i.e., demonstrating unworthiness or incompetency to act as a broker, associate broker, or salesman. Neb. Rev. Stat. § 81-885.24 (28) (Reissue 1976).
3. ____: ____. A real estate broker's license may be suspended or revoked for misconduct occurring in a real estate transaction whether the broker is acting for himself or others.
4. **Administrative Agencies: Evidence: Appeal and Error.** In proceedings to review an order of the State Real Estate Commission, the questions to be determined are whether the order of the Commission is supported by substantial evidence, whether the Commission acted within the scope of its authority, and whether its action was arbitrary, capricious, or unreasonable.

Appeal from the District Court for Douglas County: SAMUEL P. CANIGLIA, Judge. Affirmed.

Dennis E. Martin and Edward F. Pohren of Dwyer, O'Leary and Martin, P.C., for appellant.

Robert H. Petersen for appellee.

Heard before KRIVOSHA, C.J., BOSLAUGH, MCCOWN, CLINTON, BRODKEY, WHITE, and HASTINGS, JJ.

BRODKEY, J.

Laron L. Wright, plaintiff and appellant herein, ap-

peals to this court from a decree entered by the District Court of Douglas County, Nebraska, affirming an order of the State Real Estate Commission revoking the plaintiff's real estate broker's license. We affirm.

The facts of this case, as set out in the record made before the State Real Estate Commission which was admitted in evidence as exhibit 1 by the District Court, reveal that the plaintiff is a real estate broker residing in Broken Bow, Nebraska. Since 1971 he has made his living from the sale of real estate in that community, and was a licensed real estate broker in this state. It appears that prior to July 22, 1975, Wright was the owner of a residential dwelling, described as Lot 5, Block 23, J. P. Gandy's Addition to Broken Bow, Custer County, Nebraska. On July 22, 1975, the plaintiff entered into a purchase agreement to sell the property to Joseph and Ethel Holcomb, an elderly couple who had sold their farm in Custer County. The purchase agreement, which recited a selling price of $26,000, also provided that Wright would pay off a first mortgage to First Federal Savings & Loan Association of Lincoln and deliver the property to the Holcombs free and clear of any encumbrances. At the closing of the transaction, the Holcombs paid Wright the $26,000 agreed upon and Wright delivered to the Holcombs a survivorship warranty deed. Wright, however, did not pay off the mortgage to First Federal of Lincoln, as he agreed to do, and instead used the purchase money to pay off other debts.

In approximately February of 1977 Joseph Holcomb died, and Ethel Holcomb was subsequently placed into a rest home, and at that time the Nebraska State Bank & Trust Company was appointed the guardian of Mrs. Holcomb. It appears that during the spring of 1978 the guardian began to run low on funds for Mrs. Holcomb's support and decided to sell the property which had been purchased from the plaintiff. In April of 1978 the guardian entered into a purchase agreement with a Mr. Johnson, and it was then discovered that the mortgage

owed by the plaintiff to First Federal of Lincoln had not been paid.

In July of 1978 Charles Giles of the Nebraska State Bank & Trust Company filed a complaint against the plaintiff with the State Real Estate Commission. In August of 1978, after the complaint had been filed with the Commission, the plaintiff paid off the mortgage owed to First Federal of Lincoln.

On October 24, 1978, a show cause hearing on the formal complaint was held by the State Real Estate Commission, at which time the plaintiff and Mr. Giles both testified and certain exhibits were introduced into evidence. Following the presentation of the evidence, the Commission held a 5-minute closed session, found Wright to be in violation of Neb. Rev. Stat. § 81-885.24(28) (Reissue 1976), and revoked his real estate broker's license on the grounds that Wright's actions demonstrated his unworthiness and incompetence to act as a real estate broker. Plaintiff thereafter appealed the decision of the State Real Estate Commission to the District Court of Douglas County, on the record made before the Commission, under Neb. Rev. Stat. § 81-885.30 (Reissue 1976). In its decree dated December 21, 1979, the court affirmed the order of the Commission, finding that the Commission had acted within the scope of its authority; that there was substantial evidence to support the revocation order; and that the action of the State Real Estate Commission was not arbitrary or capricious.

The plaintiff now appeals to this court, assigning as error: (1) The court erred in determining that the Commission's order was supported by substantial evidence; (2) The court erred in determining that the action of the Commission was not arbitrary, capricious, or unreasonable; and (3) The court erred in affirming the order of the State Real Estate Commission.

It is the plaintiff's contention that after entering into the purchase agreement with the Holcombs, he told them of certain financial difficulties he had en-

countered, and had received the Holcombs' permission to use the purchase money to pay off his debts so long as they would eventually receive clear title to the residential property. We note, however, that the only evidence to this effect came from Wright, the appellant. The purchasers of the property, Joseph and Ethel Holcomb, did not testify at the trial, Joseph having previously died and Ethel having been adjudged an incompetent and placed under the guardianship of the Nebraska State Bank & Trust Company. Neither the State Real Estate Commission nor the District Court, on appeal, was apparently convinced by this testimony as indicated by the decision they rendered. It is clear from the record that Wright's primary contention in this case is that his competency to act as a real estate broker is not an issue in the matter since the property he sold was his own property, and he was not acting as a broker at any time during the transaction in question.

A review of certain applicable Nebraska statutes will be helpful at this point. All references will be to Neb. Rev. Stat. §§ 81-885.01 to 81-887.03 (Reissue 1976), which deal with the authority of the State Real Estate Commission. We point out, however, that there have been extensive amendments and modifications of the foregoing sections since 1976 which, however, are not applicable.

Section 81-885.10 provides that the Commission shall have the full power to regulate the issuance of licenses and to revoke or suspend licenses issued under the provisions of §§ 81-885.01 to 81-885.47 and to censure licensees. Section 81-885.12 sets out the personal requirements for applicants for such licenses and provides that licenses shall be granted only to persons "who bear a good reputation for honesty, trustworthiness, integrity, and competence to transact the business of broker or salesman in such manner as to safeguard the interests of the public, and only after satisfactory proof of such qualifications has been presented to the commission." That section also provides that the grounds for

suspension or revocation of a license, as provided for by §§ 81-885.01 to 81-885.47, or the previous revocation of a real estate license, shall also be grounds for refusal to grant a license.

The provisions of the statute most directly applicable to the case under consideration are in § 81-885.24, which sets out specific unfair trade practices which are grounds for revoking or suspending the license or certificate of real estate brokers. That section provides in part as follows: "The commission may, upon its own motion, and shall, upon the sworn complaint in writing of any person, investigate the actions of any broker, associate broker, salesman, or subdivider and shall have power to censure the licensee or certificate holder or to revoke or suspend any license or certificate, issued under sections 81-885.01 to 81-885.47 whenever the license or certificate has been obtained by false or fraudulent representation or the licensee or certificate holder has been found guilty of any of the following unfair trade practices: . . . (28) Demonstrating unworthiness or incompetency to act as a broker, associate broker, or salesman, whether of the same or of a different character as hereinbefore specified."

Section 81-885.25 provides that before the Commission shall censure a licensee or before revoking or suspending a license, it shall give the holder of the license a hearing on the matter and shall, at least 20 days prior to the date set for hearing, notify the license holder in writing. Section 81-885.29 provides that if the Commission shall determine that the license holder has been guilty of any of the violations previously referred to, his license shall be revoked or suspended forthwith, or the Commission may enter an order censuring a license holder. Section 81-885.30 provides that within 10 days after an order of the Commission has become final, the applicant for a license or a license holder may obtain judicial review thereof by giving notice to the director of an appeal, obtaining a certified transcript of the papers and evidence, and the payment of the required

fees, and shall, within 30 days of the entry of such order, file a petition for review in the District Court for the county where the cause of action or some part thereof arose. Section 81-885.31 further provides that in any judicial proceeding under §§ 81-885.01 to 81-885.47 the court shall consider the matter de novo upon the record. The court may on its own motion order additional evidence to be taken before it; and, in addition, any party to such review may offer additional evidence before the court upon serving 10 days' written notice of the offer on the other parties.

The principal issue in this case is whether Wright is correct in his contention that a real estate broker does not come within the purview of § 81-885.24(28) unless the acts complained of were performed in his official capacity as a licensed real estate broker. Concededly, there is a split of authority on this issue, some cases holding that the revocation of a broker's license may not be based on acts which were not performed in his capacity as broker or in the furtherance of a brokerage transaction, and other jurisdictions holding to the contrary. 12 Am. Jur. 2d *Brokers* § 21 (1964); Annot., Grounds for revocation or suspension of license of real-estate broker or salesman, 56 A.L.R.2d 573 (1957). Upon a review of the authorities, we are persuaded and convinced by the language and reasoning in cases such as *Goodley v. N.J. Real Estate Com.*, 29 N.J. Super. 178, 102 A.2d 65 (1954), in which case the court found that a real estate broker had demonstrated "unworthiness" under their statute authorizing the real estate commission to suspend or revoke the license of real estate brokers deemed guilty of conduct demonstrating unworthiness. In *Goodley*, the broker who negotiated the sale and received a commission thereon was also president of the corporation which was the grantor. The court held that the word "unworthiness," as used in the New Jersey statute, signified the lack of those ethical qualities that befit the vocation. In its opinion, the court stated:

"Goodley occupies two roles in this transaction, real estate broker and president of the corporate grantor. However, he cannot, under the circumstances here, escape a charge of unworthiness because the onus of the charge falls in part upon himself in a capacity other than as real estate broker. We conclude that under the circumstances his refusal to assist in the rectification of a default brought about by his own negligence justifies a finding of unworthiness.

"The word 'unworthiness,' in the context here, signifies a lack of those ethical qualities that befit the vocation. *Marrs v. Matthews*, 270 S.W. 586 (Tex. Civ. App. 1925); *cf. Woodstown National Bank & Trust Co. v. Snelbaker*, 136 N.J. Eq. 62 (Ch. 1944); *In re Meyerson*, 190 Md. 671, 59 A.2d 489, 490 (Ct. App. 1948). By including the matter of unworthiness in N.J.S.A. 45:15-17(e), the Legislature has charged the Commission with the high responsibility of maintaining ethical standards among real estate brokers and salesmen. The maintenance of those standards serves the vocation well. See *St. Germain v. Watson*, 96 Cal. App. 2d 862, 214 P.2d 99 (Dist. Ct. App. 1950), hearing denied by Supreme Court, 214 P.2d 106 (1950), and *Holland v. Florida Real Estate Commission*, 130 Fla. 590, 178 So. 121 (Sup. Ct. 1938), pointing out that statutes there, rather different from ours in their terms, but nevertheless along the same lines, were designed for those ends. For statutes in other states which contain the word unworthiness, see the following cases (which, however, deal with matters not pertinent here): *Leakey v. Georgia Real Estae Commission*, 80 Ga. App. 272, 55 S.E.2d 818 (Ct. App. 1949); *Feight v. State Real Estate Commission*, 151 Neb. 867, 39 N.W.2d 823 (Sup. Ct. 1949)." *Id.* at 181-82, 102 A.2d at 67.

In the recent case of *S.C. Real Estate Commission v. Boineau*, 267 S.C. 574, 230 S.E.2d 440 (1976), the court held that a realtor could have his broker's license revoked for conduct not strictly related to the transaction in which he was acting as broker. In that case,

the realtor contended that he was acting not as a real estate broker but on his own behalf, and further alleged that the statute for revocation of a real estate license applied solely to activities of a broker while acting in his capacity as a broker. In reply to that contention, the court stated:

"We disagree. Even as members of the bar are subject to disciplinary procedures for conduct not strictly related to the practice of law, realtors may have their licenses revoked for conduct not strictly related to a transaction in which they are acting as broker.

"In *McKnight v. Florida Real Estate Commission*, Fla. App., 202 So. (2d) 199 (1967) the court, discussing a similar situation, noted that 'it would be ludicrous to construe the statutes to mean that a broker to be answerable to the Real Estate Commission must commit the unlawful acts when engaged in real estate negotiations but should he commit the same unlawful acts when not engaged in real estate negotiations he would still be of good character and beyond the Commission's jurisdiction.'

. . . .

"Finally, it should be noted that § 56-1545.10 requires proof of a showing of honesty, integrity, truthfulness and good reputation for any person desiring to become a broker. It does not logically follow that an initial applicant should be required to possess higher moral standards than an experienced real estate broker." *Id.* at 579-80, 230 S.E.2d at 442.

This same argument advanced by Wright was rejected by the Commonwealth Court of Pennsylvania in *Yingling, Jr. v. State Real Est. Comm.*, 8 Pa. Commw. Ct. 556, 304 A.2d 524 (1973), a case factually similar to the instant case. In *Yingling*, the appellant broker agreed to sell his own house to a buyer for $23,000. The buyer gave the broker $6,500 as a downpayment. When it came time to close, however, the broker not only failed to appear but it was discovered that there was an outstanding mortgage against the property which had not

been paid. Despite several attempts, the broker failed to pay the outstanding mortgage and the buyers made a demand for the return of their downpayment. The broker returned only $2,500 of the $6,500 downpayment and the buyers subsequently filed a complaint with the State Real Estate Commission. In affirming an order of the commission revoking the broker's license, the court stated:

"The Commission's first conclusion of law was that it had jurisdiction. Appellant in this appeal contends that the Commission was in error relative to this conclusion of law since he was selling property that he owned and therefore was not acting as a broker under the Act. This same contention was rejected by us in *Fibus v. State Real Estate Commission*, 7 Pa. Commonwealth Ct. 74, 299 A.2d 375 (1973), where we followed *State Real Estate Commission v. Tice*, 200 Pa. Superior Ct. 553, 190 A.2d 188 (1963), and held that a broker's license may be suspended or revoked for misconduct occurring in a real estate transaction when the broker is acting for himself, as well as when he acts for others. We are not persuaded that we should abandon *Fibus* and therefore we hold that the Commission did have jurisdiction here." *Id.* at 560-61, 304 A.2d at 526-27.

In *State Real Estate Comm. v. Tice*, 200 Pa. Super. Ct. 553, 559, 190 A.2d 188, 190-91 (1963), the Superior Court of Pennsylvania stated: "The court below construed our Real Estate Brokers License Act so that it would apply only to persons in connection with an agency transaction and would not apply to a person who was selling his own property. *In our judgment, there can be no justification of an interpretation of the licensing act which would allow a broker to be honest as a broker and dishonest as a property owner.* A broker who is dishonest or incompetent in the real estate activities in which he is involved as owner, is not likely to be honest or competent in his activities which are purely brokerage in nature. *The purpose of real estate licensure is to bar the dishonest or incompetent for entry into this*

occupation: [citations omitted]." (Emphasis supplied.)

We concur with the aforementioned statements of the Pennsylvania courts as they apply to the circumstances present in the instant case. We note that in *Bartlett v. State Real Estate Commission*, 188 Neb. 828, 199 N.W.2d 709 (1972), this court affirmed the Commission's decision not to grant a real estate broker's license to a party who had passed the required examination. It was found that the plaintiff in *Bartlett* had been an insurance salesman whose insurance license had been revoked because he had engaged in multiple acts of fraud, misrepresentation, and dishonest practice. It would make little sense for this court to affirm the authority of the State Real Estate Commission to deny a broker's license for misconduct engaged in outside the real estate business, but deny the Commission such authority to revoke a license for misconduct occurring after a broker's license has been issued.

To the same general effect, see *Phillips v. Mann*, 147 So. 2d 559 (Fla. App. 1962); *Hyland v. Ponzio*, 159 N.J. Super. 233, 387 A.2d 1206 (1978); *Div. of the N.J. Real Estate Comm. v. Ponsi*, 39 N.J. Super. 526, 121 A.2d 555 (1956).

It is a well-established rule that in proceedings to review an order of the State Real Estate Commission the questions to be determined are whether the order of the Commission is supported by substantial evidence, whether the Commission acted within the scope of its authority, and whether its action was arbitrary, capricious, or unreasonable. *Haller v. State ex rel. State Real Estate Commission*, 198 Neb. 437, 253 N.W.2d 280 (1977); *Herink v. State ex rel. State Real Estate Commission*, 198 Neb. 241, 252 N.W.2d 172 (1977); *Johnson & Hartman v. State ex rel. State Real Estate Commission*, 202 Neb. 182, 274 N.W.2d 536 (1979). The term "substantial evidence" is defined in Black's Law Dictionary 1281 (5th ed. 1979) as: "Evidence which a reasoning mind would accept as sufficient to support a particular conclusion and consists of more than a mere scintilla of

evidence but may be somewhat less than a preponderance." See, also, 32A C.J.S. *Evidence* § 1016 (1964). In *Olson v. Westfork Properties, Inc.*, 171 Mont. 154, 557 P.2d 821 (1976), the court stated that for purposes of determining whether the trial court's findings are supported by "substantial evidence," that evidence is such as will convince a reasonable man and on which such man may not reasonably differ as to whether it establishes plaintiff's case; that evidence may be inherently weak and still be deemed "substantial," and one witness may be sufficient to establish the preponderance of the case. Also, in *Robertson Transport. Co. v. Public Serv. Comm.*, 39 Wis. 2d 653, 159 N.W.2d 636 (1968), the court held that "substantial evidence," such as is sufficient to support an administrative decision, is not equated with preponderance of evidence since there may be cases where two conflicting views may each be sustained by substantial evidence. Likewise, in *Consolo v. Federal Maritime Comm'n.*, 383 U.S. 607, 86 S. Ct. 1018, 16 L. Ed. 2d 131 (1966), the court held that "substantial evidence," for purposes of administrative review, must be enough to justify, if the trial were to a jury, a refusal to direct a verdict when the conclusion sought to be drawn from it is one of fact for the jury, and this is something less than the weight of evidence; and the possibility of drawing two inconsistent conclusions from evidence does not prevent an administrative agency's finding from being supported by substantial evidence. See, also, *Celebrezze v. Bolas*, 316 F.2d 498 (8th Cir. 1963).

We find that the evidence adduced in this case was sufficient to find that plaintiff's acts demonstrated his unworthiness and incompetence to act as a broker of real estate. The action of the State Real Estate Commission in this case is supported by "substantial evidence" as above defined and justified the order of the Commission and the decree of the District Court affirming such order. We also find that the action of the State Real Estate Commission was within the scope of its

authority, and was not arbitrary, capricious, or unreasonable.

The judgment of the District Court affirming the action of the State Real Estate Commission was correct and must be affirmed.

AFFIRMED.

VALERIUS H. DAMME AND BERNICE M. DAMME, HUSBAND AND WIFE, APPELLEES, V. NEBRASKA PUBLIC POWER DISTRICT, A PUBLIC CORPORATION AND POLITICAL SUBDIVISION, APPELLANT.

304 N.W.2d 45

Filed April 3, 1981. No. 43253.

1. **Witnesses: Testimony.** A motion to strike all the testimony of a witness should be overruled unless the entire testimony of the witness is objectionable.
2. **Eminent Domain: Evidence.** In an eminent domain proceeding a wide discretion is granted the trial judge in determining the admissibility of sales, and the evidence should not be admitted where there is a marked difference in the situation of the properties or unless the judge is satisfied that the price paid was sufficiently voluntary to be a reasonable index of value.
3. **Trial: Evidence.** Improper evidence is not made admissible merely because it is designed to meet other evidence, and this is true regardless of the propriety of the other evidence.

Appeal from the District Court for Wayne County: MERRITT C. WARREN, Judge. Affirmed.

Noyes W. Rogers of Albert, Leininger & Grant for appellant.

Christensen Law Offices, P.C., for appellees.

Heard before KRIVOSHA, C.J., WHITE, and HASTINGS, JJ., and HENDRIX and KNAPP, District Judges.

HENDRIX, District Judge.

This is an eminent domain action in which the defendant, Nebraska Public Power District, hereinafter

referred to as the District, appeals from a jury verdict and judgment for the plaintiffs, Valerius H. Damme and Bernice M. Damme, hereinafter referred to as the landowners, in the amount of $14,375.

The District asserts that the case should be reversed because the trial court refused to strike certain evidence and rejected certain other evidence. We affirm.

The landowners' property consists of a 152-acre farm with about 78.6 acres of cropland in two fields, about 68.4 acres of pasture, and about 5 acres used as a building site. The building site contains a garage, four granaries, a chickenhouse, a bin with auger, two small buildings, and a house occupied by the landowners. It is located in rural Wayne County just east of Highway 15, a blacktop road.

The taking is a right-of-way easement for overhang only for the construction and operation of a 345,000-volt transmission line. The line runs along the south side of landowners' property. It enters the property 768 feet east of the west line and about 430 feet from the house. The easement itself expands to a maximum of 80 feet in width and is about 1,872 feet long. A steel lattice structure, not on landowners' property, is located about 350 feet from the house. The closest phase wire, not on landowners' property, is located about 185 feet from the house.

The question presented by the refusal of the trial court to strike concerns the testimony of Henry B. Woodard, a neighboring farmer, called by the landowners. On direct examination he testified as to facts regarding his own farming operation, the landowners' farm, his knowledge of farm sales in the area, his knowledge of the taking, and the things which would affect a prospective purchaser after the placement of the line. He further testified as to his opinion of the fair market value of the landowners' property before and after the taking and placement of the line. On cross-examination Mr. Woodard testified that the line would not interfere with farming; that the main damage was to

the house; and that only feedlots of average size were located in the area but that larger feedlots could affect the value of the residence of landowners. On further cross-examination regarding the house, he was asked if it was his opinion that the line would devalue the house by $45,000, and the witness replied, "In my opinion, if I were buying the farm, it would." Whereupon, he was asked, "Well, then, you based your opinion on what you would think if you were buying the farm?" To which the witness replied, "Yes." At this point a motion was made to strike the testimony of the witness. It was overruled, and no further questions were asked of him.

We do not construe these answers to establish a failure of the witness to use market value as a basis for his originally given figures. It was not made clear, either, that the witness failed to make the original determination upon his knowledge of the farm and experiences with the market. Rather, his remarks may well have been merely a layman's method of expressing the effect the line would have upon a prospective purchaser. In any event, while the examination of the witness, both in direct and upon cross, was carried on in great measure by leading questions and brief answers, he did testify to matters other than values, and this testimony was certainly admissible. For example, testimony of the situation of landowners' farm and the number, location, and size of surrounding feedlots would not be conditioned upon his using a proper measure of damages. The motion to strike "the testimony" amounted to a motion to strike all the testimony of the witness, was too broad, and was correctly overruled. *Neldeberg v. City of Omaha*, 124 Neb. 511, 247 N.W. 45 (1933).

The evidence rejected by the trial court consisted of testimony of the sale price of development houses near, but outside, the city limits of Omaha and about 90 miles from the property of the landowners. Specifically, the testimony proposed by offer of proof would have shown the sale price of houses in close proximity to a 345,000-volt line as opposed to the sale price of similar houses

not in such close proximity. While the houses were similar to each other, they were not similar to landowners' property. The witnesses had not determined the sales to be voluntary by talking to the buyer or seller or otherwise. It is established law in this jurisdiction that in an eminent domain proceeding a wide discretion must be granted the trial judge in determining the admissibility of sales, and the evidence should not be admitted where there is a marked difference in the situation of the properties or unless the judge is satisfied that the price paid was sufficiently voluntary to be a reasonable index of value. *Anderson v. State*, 184 Neb. 467, 168 N.W.2d 522 (1969); *Swanson v. State*, 178 Neb. 671, 134 N.W.2d 810 (1965). The proffered evidence fails in both categories. The sales sought to be shown are of properties which have no real similarities, they having the differences inherent between rural and suburban properties. The District points to the case of *Y Motel, Inc. v. State*, 193 Neb. 526, 227 N.W.2d 869 (1975), which permits evidence of sales of comparable property in other states. The difference, of course, is that in *Y Motel, Inc.*, the other properties were shown to be comparable, even though far apart in distance. In the instant case, the properties are simply not comparable.

The District further argues that the sale prices offered should be admitted as rebuttal, since one of the landowners testified without objection that nobody wants to be close to a big power line and other witnesses testified without objection that the value of the house would be reduced by virtue of the power line. From its earliest days to modern times this court has held that improper evidence is not made admissible merely because it is designed to meet other evidence, and this is true regardless of the propriety of the other evidence. *McCartny v. The Territory of Nebraska*, 1 Neb. 121 (1871); *Conley v. Hays*, 153 Neb. 733, 45 N.W.2d 900 (1951). In every eminent domain action there are alleged elements of damages which might be met by

showing sales of dissimilar properties. The reasoning required to permit the proposed evidence in this case would be a departure from precedent and logic. It would open the door to evidence where the probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, misleading the jury, and undue delay. Neb. Rev. Stat. § 27-403 (Reissue 1979).

AFFIRMED.

WHITE, J., dissenting.

I disagree. The entire basis of the landowners' claim in this case is the perceived undesirability of living in close proximity to a high voltage power line, and the negative effect on fair market value. Expert witnesses testified to the existence of that perceived undesirability and were not able to demonstrate it in fact. The appellant's attorney attempted to prove the reverse of the proposition by the most telling method — substantially identical properties, one close to a high voltage line, the other not, selling for similar prices. Whether appellant could have demonstrated that both were voluntary sales cannot be known as it was prevented from introducing such evidence. I believe the refusal to receive the evidence was an abuse of the trial court's discretion and prejudiced the appellant. The important fact, overlooked by the trial court and the majority, is the purpose for which the evidence was offered. It was proper and, accordingly, I would reverse and remand.

ROBERT C. LITZ AND GENEEN K. LITZ, HUSBAND AND WIFE, APPELLANTS, V. REX W. WILSON, APPELLEE.

304 N.W.2d 48

Filed April 3, 1981. No. 43304.

1. **Contracts: Property: Sales.** The promise in a land sales contract for the seller to convey real estate is consideration for the promise of the buyer to purchase the real estate.
2. ____: ____: ____. Where a land sales contract is executory and the vendee makes default, the remedies of the vendor are to rescind, specific performance, foreclosure of the contract as a mortgage, or bring suit for damages for the breach.
3. **Contracts: Specific Performance.** As a general rule, where a valid contract exists, which is definite and certain in its terms, mutual in obligation, and free from unfairness, fraud, or overreaching, a court will grant a decree of specific performance where the remedy at law is inadequate and specific performance will not be inequitable or unjust.
4. **Specific Performance.** The burden is on the party seeking specific performance to show his right in equity and good conscience to the relief sought by clear and satisfactory evidence.
5. **Equity: Contracts.** A court of equity will refuse to enforce a contract when it is not clearly satisfied that it embodies the real understanding of the parties.

Appeal from the District Court for Holt County: HENRY F. REIMER, Judge. Affirmed.

Edward E. Hannon of Cronin, Hannon & Symonds for appellants.

Arlen D. Magnuson for appellee.

Heard before KRIVOSHA, C.J., MCCOWN, CLINTON, BRODKEY, WHITE, and HASTINGS, JJ., and RONIN, District Judge.

RONIN, District Judge.

This is an action in equity brought by the plaintiffs, Robert C. Litz and Geneen K. Litz, husband and wife, for the specific performance of a written contract for the sale of real estate to the defendant, Rex W. Wilson. Plaintiffs seek in their petition not only to foreclose their sellers' lien upon the subject real estate but also to reform the legal description of the property. The trial

court denied specific performance and held that the contract was an option to purchase real estate which was never exercised by the defendant prior to its expiration on July 1, 1976. The plaintiff sellers have appealed. The sellers having brought an equitable action of specific performance in this case, our review on appeal is de novo.

The written contract was entered into by the parties on May 25, 1976, for the sale of an unimproved acreage just outside the city limits of O'Neill, Nebraska, and "containing approximately 17 acres." The record is undisputed that the subject real estate contained only 14.472 acres and that the plaintiffs were in error in representing to the defendant the size of the subject tract. The contract provided for a sale price of $100,000 with a downpayment of $1 which was paid by the defendant to the plaintiffs at the time of the execution of the contract. Twenty-eight thousand dollars was to be paid on or before July 1, 1976, with the remainder to be paid in equal annual payments. In June of 1976 plaintiffs' attorney, Ronald Olberding, advised defendant of an error in the legal description of the property. This error placed the property approximately 11 feet to the west of its actual location. On July 2, 1976, the defendant advised Olberding that he would not perform his part of the contract because of the error in the legal description of the real estate.

We find that the contract contained no provision for an option to purchase and that the trial court was in error in its finding that the contract provided for an option which was not exercised by the defendant. We also find that the nominal payment of the $1 provision in the contract was clearly for a downpayment and there was no liquidated damages provision for its rescission as contended by the defendant. The written contractual promise of the plaintiffs to sell and the promise of the defendant to purchase the subject real estate provide sufficient consideration for the subject written contract. Restatement of Contracts § 75 (1932); *Abel v.*

Gill, 95 Neb. 279, 145 N.W. 637 (1914). We hold that the written contract of the parties was a contract for the sale of real estate without an option provision for the defendant.

A seller under a written land contract may bring an equitable action for specific performance of its provisions. In *Colson v. Estate of Johnson*, 111 Neb. 773, 776, 197 N.W. 674, 675 (1924), our court stated: "[W]here the land contract is executory and the vendee makes default, the remedies of the vendor are to rescind, specific performance, foreclose the contract as a mortgage, or bring suit for damages for the breach." It has also been stated: "As a general rule, where a valid binding contract exists, which is *definite* and *certain in its terms*, mutual in obligation, and *free from unfairness*, fraud, *or overreaching*, a court will grant a decree of specific performance as a matter of course or right where the remedy at law is inadequate and specific performance will not be *inequitable or unjust.*" (Emphasis supplied.) *Reese v. Hatfield*, 201 Neb. 540, 543, 270 N.W.2d 898, 899 (1978). However, "[s]pecific performance of a contract by a court of equity is not generally demandable or awarded as a matter of absolute legal right, but is directed to and governed by the sound legal discretion of the court, dependent upon the facts and circumstances of each particular case." *Menke v. Foote*, 199 Neb. 800, 806-07, 261 N.W.2d 635, 639 (1978).

Our court in *Panhandle Rehabilitation Center, Inc. v. Larson*, 205 Neb. 605, 607, 288 N.W.2d 743, 745 (1980), stated: "'The burden is primarily on the party seeking specific performance to show his right in equity and good conscience to the relief sought. * * * The evidence which entitles a party to specific performance must be clear, satisfactory, and unequivocal.'"

The defendant, Dr. Rex W. Wilson, in his second amended answer alleges, among other defenses, that he was mentally incompetent to enter into a valid real estate contract when he signed the real estate agree-

ment in this case on May 25, 1976. The evidence is undisputed that the defendant suffered a stroke in 1972 and was hospitalized in Omaha, Nebraska. Dr. Harold Ladwig, a neurologist, was his treating physician, and numerous psychological tests were administered by Dr. Gerald Rosenblatt. The depositions of these medical witnesses were read into evidence and relate the acute symptoms of the severity of his stroke. It was also noted that the defendant had an alcohol intake problem for which he later received inpatient treatment from November 18, 1973, until January 16, 1974, after which he left his general medical practice and became involved with alcohol treatment programs.

In March 1976 Dr. Ladwig again examined the defendant at the request of a Dr. John Sage. Dr. Ladwig's testimony is that the defendant's judgment was definitely impaired and that he exhibited a manic-like behavior at times; that this mental condition would continue in the future; and that the defendant's impairment of judgment was sufficient that it would be difficult for him to understand all the necessary information with regard to the written contract that he signed.

The record discloses that the defendant had not received the advice of a licensed realtor or the services of an attorney prior to his signing the contract. We find that the contractual price of $100,000 for the subject unimproved real estate tract was clearly exorbitant. Another defense alleged by the defendant is that the plaintiffs represented several times to the defendant, and the written contract for sale of the real estate provided, that it contained "approximately 17 acres" whereas its actual size was only 14.472 acres. The evidence is undisputed that the plaintiffs did misrepresent the size of the subject real estate in the contract in this respect.

The issues in this action in equity must be resolved on applicable equitable principles. 71 Am. Jur. 2d *Specific Performance* §§ 52, 53 (1973). We find that any one of the defenses of the defendant would probably not be

adequate by itself to deny specific performance of the sales contract. However, we find the totality of the circumstances, which includes the impairment of the judgment of the defendant at the time of the execution of the agreement, is such that the plaintiffs have clearly failed to sustain their required burden to prove their right in equity and good conscience for the specific performance of the written real estate sales agreement.

While we would not agree with the finding of the trial court that the written sales contract was only an option, we hold that specific performance of the written contract of the parties was properly denied and plaintiffs' amended petition be dismissed for the reasons stated. The judgment of the trial court is affirmed.

AFFIRMED.

WHITE, J., concurs in result.

RICHARD A. JENSEN, APPELLEE, V. UNIVERSAL UNDERWRITERS INSURANCE COMPANY, A CORPORATION, APPELLANT.

304 N.W.2d 51

Filed April 3, 1981. No. 43314.

Insurance: Motor Vehicles. Where an excess insurance clause in a driver's automobile liability policy and a no-liability clause in the automobile owner's liability policy apparently conflict, the no-liability clause is ineffective and the driver's insurance excess.

Appeal from the District Court for Douglas County: DONALD J. HAMILTON, Judge. Affirmed.

Harold W. Kauffman and Eugene P. Welch of Gross, Welch, Vinardi, Kauffman, Day & Langdon for appellant.

John R. Douglas and Ronald F. Krause of Cassem, Tierney, Adams, Gotch & Douglas for appellee.

Heard before KRIVOSHA, C.J., BOSLAUGH, MCCOWN, CLINTON, BRODKEY, WHITE, and HASTINGS, JJ.

HASTINGS, J.

This was a suit for a declaratory judgment. The District Court was asked to determine whether or not a certain policy of insurance issued by Universal Underwriters Insurance Company, a corporation (Underwriters), afforded coverage to the plaintiff, Richard A. Jensen, against any liability which he might have as the result of an automobile accident which occurred on April 1, 1977. The court found in favor of Jensen, declaring that coverage was available, and Underwriters has appealed. We affirm.

By reason of his employment, Jensen had available for his use a certain 1976 Pontiac automobile leased by his employer, Byers Brothers, from Nishna Valley Leasing, Inc. Nishna Valley Leasing together with McAlpin Motors were corporations with common ownership who were both named as insureds under a garage liability policy, No. 483496D, issued by Underwriters. A few days prior to April 1, 1977, the 1976 Pontiac was taken into McAlpin Motors for repairs, which company loaned to Jensen as a temporary replacement automobile a 1975 Pontiac owned by McAlpin. It was this automobile which Jensen was driving on April 1, 1977, when he was involved in an accident with a pedestrian who then filed suit against Jensen seeking money damages.

At the time of the accident referred to, the Hartford Accident and Indemnity Co. had in full force and effect an automobile liability insurance policy issued to Byers Brothers which included as insureds its employees and specifically covered the previously mentioned leased 1976 Pontiac.

Although the parties tried the case as if there were no real factual issues, we are faced at the outset with some confusion as to the identity and contents of the Underwriters policy. In response to an interrogatory

served on Underwriters by Jensen requesting that the terms of the garage liability policy be set forth, Underwriters furnished what has been identified as exhibit 2. This is a series of printed insurance policy forms. The problem, however, is that they appear to be part or all of three different policies. The first series consists of two pages, the first of which is entitled "Unicover Coverage Part No. 400 Garage Insurance," and which contain, respectively, the identifications "Page 2 . . ." and "Page 3 . . . ." In addition, the first page has printed at the top "Edition September 1973," and at the bottom of both pages appears "(9-73)" and "Copyright 1973 Universal Underwriters Insurance Company." The second series is similarly captioned as "Unicover . . ." but is numbered from page 2 through page 9, and is identified as "Edition December 1978," "(12-78)," and "Copyright 1973, 1975, 1977, 1978 Universal Underwriters Insurance Company." The third group of forms is also captioned "Unicover . . . ," is numbered from page 2 through page 9, and is identified as "Edition March 1977," "(3-77)," and "Copyright 1973, 1975, 1977 Universal Underwriters Insurance Company." The remaining pages of exhibit 2 consist of computer printouts obviously purporting to identify the named insureds, the policy periods, which include the critical date of April 1, 1977, the applicability of various coverages, and other information normally found in insurance policy face sheets. However, there is nothing about any of the information contained in those printouts which identifies the effective date of any particular edition of the three groups of forms.

We would observe that although the burden of proof is on the plaintiff to furnish sufficient evidence upon which a declaratory judgment can be made, Underwriters is bound by answers to interrogatories, i.e., the representation that exhibit 2 contains the proper policy provisions, even though they may be incorrect or incomplete, as long as the applicable provisions can properly be identified and interpreted.

The two pages identified as the 1973 edition conceivably could be applicable to the April 1, 1977, accident because it is reasonable to believe that the words "Edition September 1973" and "Copyright 1973 . . ." indicate that they were in existence from and after that printed date. However, in comparing them with the nine pages of the 1978 and 1977 editions, it becomes obvious that the one for 1973 is incomplete. A reading of the entire two pages reveals no definition of the term "insured," which is critical to any insurance policy.

At the other extreme is the 1978 edition. It could not seriously be contended that a group of forms which were copyrighted in 1978 could be effective during the year 1977.

That of course leaves the remaining policy, the edition of March 1977, which in all reason and logic would be applicable to an April 1977 event. It must be assumed that when Underwriters represented that exhibit 2 comprised the policy in effect at the critical date, it meant what it said. An examination of the 1977 edition reveals a policy of insurance complete in itself.

Looking to the 1977 policy, then, it quite clearly applies to this specific hazard, i.e.: "I. ADDITIONAL DEFINITIONS . . . AUTOMOBILE HAZARD 1 . . . (3) the ownership, maintenance or use of any AUTOMOBILE owned by the NAMED INSURED while furnished for the use of any person."

Taking up for the moment the Underwriters claim made in the court below that the particular use was specifically excluded, we find the following in the policy: "II. GARAGE LIABILITY . . . EXCLUSIONS This insurance does not apply . . . (e) to BODILY INJURY or PROPERTY DAMAGE arising out of the . . . operation, use . . . of any . . . (2) AUTOMOBILE . . . (ii) while rented to others by the NAMED INSURED unless to a salesman for use principally in the business of the NAMED INSURED . . . ." However, Underwriters ignores page 6 of the insurance contract, which states as follows: "ENDORSEMENT NO. 6 CUS-

TOMER RENTAL . . . It is agreed that Exclusion (e), (2), (ii) of Section II Garage Liability is deleted in its entirety and replaced by the following Exclusion: (ii) while rented to others by the NAMED INSURED . . . unless to a customer of the NAMED INSURED while such customer's AUTOMOBILE is temporarily left with the NAMED INSURED for service, repair . . . ." Even though Jensen's possession of the 1975 Pontiac was indirectly the result of a lease of the primary automobile, the 1976 Pontiac, we believe that his possession of the 1975 automobile on the date of the accident was as a result of a temporary loan while his own automobile was being repaired. Clearly, Jensen's rental, if such be the case, came within the exception to the exclusionary section.

Finally, the critical question is whether or not Jensen was an "insured" within the meaning of Underwriters' policy. The appropriate language is found in section "IV PERSONS INSURED" of the policy. Therein it is stated: "Each of the following is an INSURED under this insurance to the extent set forth below: . . . (3) with respect to the AUTOMOBILE HAZARD; . . . (b) any other person while actually using an AUTOMOBILE covered by this Coverage part with the permission of the NAMED INSURED, provided that such other person (i) *has no automobile liability insurance policy of his (her) own, either primary or excess* . . . ." (Emphasis supplied.) Both parties agree that the particular automobile being used was covered by the policy and that Jensen had the permission of the named insured to use it.

The only problem remaining concerns the italicized portion of the last-quoted language. As earlier stated, Jensen, at the time of the accident, was covered by a policy of automobile liability insurance on the automobile which he regularly drove. That policy contained the following language: "VIII. ADDITIONAL CONDITION Other Insurance — Temporary Substitute and Newly Acquired Automobiles With respect to a *temporary substitute automobile*, this insurance shall be excess insurance over any other valid and collectible

insurance available to the *insured.*" It is the contention of Underwriters that, assuming everything else was as claimed by Jensen, he was not an insured under its policy because, to be so classified, he must have had "no automobile insurance policy of his . . . own, either primary or excess."

A similar conflict between the automobile owner's policy and the driver's policy was resolved against the position of Underwriters in *Bituminous Cas. Corp. v. Andersen,* 184 Neb. 670, 673, 171 N.W.2d 175, 176 (1969): "Where an excess insurance clause in a driver's automobile liability policy and a no-liability clause in the automobile owner's liability policy apparently conflict, the no-liability clause is ineffective and the driver's insurance excess."

Although Hartford Accident and Indemnity Co. is not a party to this action, and we are not called upon to declare its rights, in keeping with the rule laid down in *Bituminous, supra,* we agree with the judgment of the District Court that the policy of insurance issued by Underwriters affords coverage to Jensen, and that judgment is affirmed.

AFFIRMED.

JOHN C. RAGLAND AND SHIRLEY ANN RAGLAND, HUSBAND AND WIFE, APPELLANTS, V. NORRIS PUBLIC POWER DISTRICT, A PUBLIC CORPORATION AND POLITICAL SUBDIVISION OF THE STATE OF NEBRASKA, APPELLEE.

304 N.W.2d 55

Filed April 3, 1981. No. 43315.

1. **Statutes.** A statute is not to be read as if open to construction as a matter of course. Where the words of a statute are plain, direct, and unambiguous, no interpretation is needed to ascertain the meaning. In the absence of anything to indicate the contrary, words must be given their ordinary meaning.

2. ____. It is not within the province of a court to read a meaning into a statute that is not warranted by the legislative language. Neither is it within the province of a court to read anything plain, direct, and unambiguous out of a statute.
3. **Governmental Subdivisions: Tort Claims: Statute of Limitations.** Where the governmental subdivision does not act on a claim within 2 years after the claim accrued and the claimant does not withdraw the claim within 2 years after the claim accrued, all suits permitted by the Political Subdivisions Tort Claims Act are barred and the additional 6-month period granted under particular circumstances does not apply.

Appeal from the District Court for Lancaster County: WILLIAM D. BLUE, Judge. Affirmed.

Miles W. Johnston and Daniel E. Wherry of Johnston, Grossman, Johnston, Barber & Wherry for appellants.

Steven G. Seglin of Crosby, Guenzel, Davis, Kessner & Kuester for appellee.

Heard before KRIVOSHA, C.J., BOSLAUGH, MCCOWN, CLINTON, BRODKEY, WHITE, and HASTINGS, JJ.

KRIVOSHA, C.J.

The appellants, John C. Ragland and Shirley Ann Ragland (Ragland), appeal from an order entered by the District Court for Lancaster County, Nebraska, finding that the Raglands had failed to present a written claim to the appellee, Norris Public Power District, a public corporation and political subdivision of the State of Nebraska (Norris), within 1 year from the accrual of such claim and further failed to commence an action within 2 years of such accrual, all as required by Neb. Rev. Stat. § 23-2416(1) (Reissue 1977).

While Ragland has raised both the issue concerning the sufficiency of the claim and the matter of the statute of limitations, we believe that the appeal must be decided against Ragland on the issue of the statute of limitations and we need not consider the form of the claim. We therefore affirm the judgment of the trial court.

In October of 1976, Norris, desiring to eliminate vegetation interfering with certain of its power lines, applied a chemical known as Tordon 10K to a hedgerow owned by Ragland and located generally on the Ragland property next to the county right-of-way. On June 10, 1977, Ragland appeared at the Lincoln office of Norris and informed the Lincoln office manager, Wilber Hanson, that Norris had damaged trees on Ragland's property and that Ragland wanted to be compensated by Norris. There is a dispute in the evidence concerning what, if any, written document Ragland presented at that time. Ragland maintains that he presented to Hanson a small piece of spiral note paper upon which he had written "205 x 100 = $20,500," indicating that 205 trees at $100 per tree had been damaged for a total of $20,500. Norris maintains that he simply provided Hanson with a business card on which he had written on the backside: "225 trees x 100 = $22,500." While an issue may be raised as to the sufficiency of the form of the claim, we need not decide that issue in this case. Assuming, but not deciding, that the claim was sufficient, Ragland still cannot obtain any relief in this action.

Thereafter, on June 23, 1977, Glen Schmieding wrote Ragland a letter, stating in part: "[W]e feel that a claim of $22,500 is entirely out of line." Between June 23, 1977, and March of 1979, further efforts were made by the parties to discuss the possibility of settlement, though no agreement was reached. In March of 1979 all contact between the parties regarding the hedgerow ceased. Norris made no effort to formally deny the claim unless the letter of June 23, 1977, from Norris to Ragland is considered to be such a denial. Likewise, Ragland made no effort to withdraw the claim and took no other positive action in regard to the claim until he filed suit on June 13, 1979.

The narrow question necessary for our consideration is whether the petition filed on June 13, 1979, was already barred by the statute of limitations appli-

cable to cases of this nature or whether Ragland was entitled to an additional 6 months from and after the day upon which the 2 years expired in which to file his petition.

Section 23-2416 provides as follows: "(1) Every claim against a political subdivision permitted under this act shall be forever barred, unless within one year after such claim accrued, the claim is made in writing to the governing body. Except as otherwise provided in this section, all suits permitted by this act shall be forever barred unless begun within two years after such claim accrued. The time to begin a suit under this act *shall be extended for a period of six months from the date of mailing of notice to the claimant by the governing body as to the final disposition of the claim or from the date of withdrawal of the claim from the governing body* under section 23-2405, if the time to begin suit would otherwise expire before the end of such period." (Emphasis supplied.)

Ragland concedes that his suit was not filed within 2 years from the date after the claim accrued. He maintains, however, that he has an additional 6 months in which to file the claim by reason of the final sentence of § 23-2416(1), which extends the statute of limitations for an additional 6-month period upon the happening of certain events and certain conditions. We believe that Ragland is in error in that regard.

The statute is clear beyond question that suit must be filed within 2 years after the date the claim accrued or it will be forever barred. There are but two exceptions to that provision. One is where the governmental subdivision takes some action on the claim before the 2 years has expired but at a time when less than 6 months remains for filing suit. The second occurs if the claimant withdraws his claim within the 2-year period but at a time when less than 6 months to file suit remains. Under either of those circumstances the statute of limitations is extended for an additional 6-month period from and after the date that the governmental sub-

division acts on the claim or the claim is withdrawn by the claimant. In order for the extended period to apply, one of two positive acts must occur: the governmental subdivision must act on the claim or the claimant must withdraw the claim. Absent the occurrence of either one of those affirmative steps, the statute of limitations runs at the end of 2 years from and after the date the claim accrued, and the action is barred.

In this case, Ragland concedes that the governmental subdivision did not formally take any action on his claim, though Norris maintains that its letter of June 23, 1977, was a denial of the claim. Likewise, Ragland concedes that he took no positive action to withdraw the claim before the expiration of the 2-year period. He argues, however, that if the governmental subdivision does not deny the claim before the 2 years have expired and the claimant does not withdraw the claim before that time, then the failure of either party to act shall constitute the performance of the act extending the statute of limitations. That argument does not follow from the plain language of the statute.

In adopting the act in question, the Legislature recognized that a governmental subdivision might wait until a day before the statute of limitations had run to deny a claim and thereby prevent the claimant from having an opportunity to employ a lawyer, make investigation, and file suit. For that reason, it provided that if the governmental subdivision acted on the claim before the statute of limitations had run but at a time when less than 6 months remained, an additional 6 months was to be granted to the claimant to provide him an opportunity to make the necessary investigation and file suit. Likewise, the Legislature recognized that no one could compel the governmental subdivision to act on the claim if it chose not to do so, and, therefore, the claimant would be placed in the difficult position of having lost his right simply by the inaction of the governmental subdivision. For that reason, the claimant was given the right to withdraw the claim up to 1 day before the

statute of limitations had run and thereby acquire an additional 6 months in which to obtain counsel, make investigation, and file suit. In order, however, for that right to come into being, the claimant is obligated to take an affirmative act, to wit: withdraw his claim. His failure to do so and his permitting the statute of limitations to run cannot be considered the performance of the act required by the statute, nor can the filing of a petition after the statute of limitations has run be considered the withdrawing of a claim prior to the time the statute has run.

In the instant case it is an unfortunate situation that the claim was not withdrawn before the statute had run. Ragland, however, urges us to interpret and construe the statute so as to have it read by implication that the failure to withdraw the claim before the statute runs, and before the governmental subdivision acts in denying the claim, is tantamount to denial or withdrawal and thereby causes the 6-month extension to come into effect. We are not, however, at liberty to do so.

"'A statute is not to be read as if open to construction as a matter of course. Where the words of a statute are plain, direct, and unambiguous, no interpretation is needed to ascertain the meaning. In the absence of anything to indicate the contrary, words must be given their ordinary meaning. It is not within the province of a court to read a meaning into a statute that is not warranted by the legislative language. Neither is it within the province of a court to read anything plain, direct, and unambiguous out of a statute.'" *O'Neill Production Credit Assn. v. Schnoor, ante* p. 105, 108, 302 N.W.2d 376, 378 (1981); *Bachus v. Swanson*, 179 Neb. 1, 136 N.W.2d 189 (1965). The language of the statute in the instant case does not require any construction and is clear. Where the governmental subdivision does not act on a claim within 2 years after the claim accrued and the claimant does not withdraw the claim within 2 years after the claim accrued, all suits permitted by the Political Subdivisions Tort Claims Act are barred and

the additional 6-month period granted under particular circumstances does not apply. For that reason, the judgment of the trial court must be affirmed.

AFFIRMED.

DENNIS BURNHAM, APPELLANT, V. CAROLYN BURNHAM, APPELLEE.

304 N.W.2d 58

Filed April 3, 1981. No. 43447.

1. **Divorce: Appeal and Error.** An appeal in a dissolution of marriage action is reviewed de novo by this court.
2. **Child Custody.** Where the issue of child custody is involved, both the mother and the father have an equal right to the custody of their children. The test for determining custody is the best interests of the child.
3. ____ In determining which parent shall be awarded custody of the children, the court shall not give preference to either parent based on the sex of the parent.
4. ____ Although the courts should preserve an attitude of impartiality between religions and will not disqualify a parent solely because of his or her religious beliefs, we do have a duty to consider whether such beliefs threaten the health and well-being of a child.
5. ____ In determining the best interests of a child in awarding custody, the court must consider myriad factors in working toward this goal, and to hold that it may not consider religious factors under any circumstances would blind courts to important elements bearing on the best interests of the child.
6. ____ In determining the question of custody of a child, it is proper for a court to examine the impact of the parent's beliefs on the child.

Appeal from the District Court for Douglas County: ROBERT V. BURKHARD, Judge. Reversed and remanded with instructions.

Steven Lefler for appellant.

John S. Slowiaczek of Erickson, Sederstrom, Leigh, Eisenstatt, Johnson, Kinnamon, Koukol & Fortune, P.C., for appellee.

Heard before KRIVOSHA, C.J., BOSLAUGH, MCCOWN, CLINTON, BRODKEY, WHITE and HASTINGS, JJ.

HASTINGS, J.

Dennis Burnham has appealed from an order of the District Court for Douglas County dissolving the marriage of the parties and awarding custody of their only daughter, Jaime (referred to in the decree as Jamie), to the mother, Carolyn Burnham. Appellant has assigned the following as error: (1) The court erred in placing permanent custody of the child with the mother; (2) The court erred in assessing child support in the amount of $300 to be paid by the father, such amount being clearly excessive; (3) The court erred in not allowing into evidence a video tape regarding the Tridentine Church; and (4) The court erred in overruling the motion for new trial. For the reasons to follow, we reverse the order of the District Court.

The parties were married on December 19, 1975, in Omaha, Nebraska, at St. Bernard's Catholic Church. One child was born to this union on October 2, 1976, a daughter, Jaime Burnham. Dennis is employed by the Union Pacific Railroad and grosses $19,000 per year. Carolyn works as a bookkeeper for her father and grosses $9,000 per year. The parties purchased a home during the marriage, which was awarded to Carolyn and then sold by her to Dennis. The trial court made the factual finding that both parties are fit and proper persons to be awarded the care and control of the minor child.

Most of the evidence at trial focused on the religious differences between the parties, and these differences appear to be the reason for the dissolution and custody fight. Dennis was originally a Lutheran, who converted to Catholicism so that they could attend church as a family. In approximately August of 1978 Carolyn became interested in a sect calling itself the Tridentine Church, or the Fatima Crusaders. Carolyn was encouraged to get involved in the group by her parents, and her interest intensified over the next several months. Carolyn encouraged Dennis to get involved and attend meetings. However, he refused to do so. It was

this religious disagreement that Dennis blames for beginning the problems the parties were having in their relationship. In December of 1978 Dennis learned that Carolyn and her parents did not consider that the marriage of the parties was legitimate, and that they were therefore living in sin. The reason that the marriage was not considered legitimate was that they were not married in the Fatima Crusader Church. Because of her view of her marriage, Carolyn testified that she did not consider her child to be legitimate.

Carolyn also adheres to the belief that as a member of the Tridentine Church she is bound under pain of mortal sin to educate her child in the Tridentine Church, which is considered to be the true Catholic Church by its members. It is the teaching of the church that if Carolyn did not send Jaime to a Tridentine parochial school, and it was within her power to do so, then she would be excommunicated. The church's school is in Coeur d'Alene, Idaho, where Carolyn would like to send Jaime when she is of school age and it would be financially possible to do so. One of the exhibits was a copy of the general regulations of the school and its statement of principle, including a release to be signed by the parents. The release gives full permission for the use of strict discipline and corporal punishment. It then relieves the academy, all of the teachers and school personnel, various religious leaders, and the property owners, of all responsibility for the child in case of accident or injury or any unforeseen mishap.

In a letter that Carolyn wrote to her sister-in-law, she stated: "What surprised me the most, in finding out about true Catholicism, I have discovered that there exists in this world, a master plot on the part of the Jews and Communists, to gain control of the world." This points out the anti-Semitic views that Carolyn believes are being taught by the Tridentine Church and which she testified that she believed to be true.

The evidence shows that Carolyn's parents are members of the Tridentine Catholic Church, and three

of their children are attending a Tridentine school in Spokane, Washington. One of their children, Jim, age 23, who apparently does not adhere to the same religious beliefs, has been denied communication with the family. Carolyn testified on cross-examination that she agreed with her parents not being in communication with her brother. In fact, she returned a toy to Jim that he had sent as a gift to Jaime.

Carolyn testified as follows: "Q. If Jaime did the same thing, if Jaime did not believe at the age of 14 or 15 the tenets of the Tridentine Catholic Church, would you do to her what your parents are doing to Jim? A. If she disobeys the laws of the Church, I would. Q. No room for flexibility, then? A. The laws of the Church are the laws of the Church. Q. Thank you, that's answering it. Do you anticipate that in every parent-child relationship there is going to be times of conflict? A. Yes. Q. And even though that's a natural parent-child relationship, if she disobeys the rules of the Church, you are willing to cut her off from your life? A. If Jaime does what Jim did, yes. Q. If Jaime disobeyed the laws of the Church? A. Depending on which law, how it would affect me. That's too vague. Q. That's certainly possible? A. Possible what? Q. It's possible that you could cut her off from your life? A. If she married somebody that was divorced, yes."

The appellant argues that it was error for the District Court to place the custody of Jaime with Carolyn rather than with him. This case is one of equity and is reviewed de novo. "Where the issue of child custody is involved, both the mother and father have an equal and joint right to the custody of their children. The test for determining custody, which has been reiterated by this court many times, is the best interests of the child." *Theye v. Theye*, 200 Neb. 206, 207, 263 N.W.2d 92, 94 (1978).

Neb. Rev. Stat. § 42-364(2) (Reissue 1978) states: "In determining with which of the parents the children, or any of them, shall remain, the court shall not give

preference to either parent based on the sex of the parent and no presumption shall exist that either parent is more fit to have custody of the children than the other."

On a review de novo, the parents begin with an equal right to have custody; there can be no preferences based on the sex of the parent nor are there any presumptions that one parent is more fit than another. *Meysenburg v. Meysenburg, ante* p. 456, 303 N.W.2d 783 (1981). From this base, we must then consider the evidence presented at the custody hearing to determine with which parent it would be in the best interests for the child to remain. As previously noted, the trial court found, and we agree, that both parents are fit and proper persons to have custody of Jaime.

"The courts preserve an attitude of impartiality between religions and will not disqualify a parent because of his or her religious beliefs." *Goodman v. Goodman*, 180 Neb. 83, 88, 141 N.W.2d 445, 448 (1966). However, we do have a duty to consider whether such beliefs threaten the health or well-being of the child. *Goodman, supra.* See, generally, Annot., 66 A.L.R.2d 1410 (1959). Of primary consideration is the welfare of the child, and the court must consider not only the spiritual and temporal welfare but also the minor's further training, education, morals, and the ability of the proposed guardian to best take care of the child. *Kaufmann v. Kaufmann*, 140 Neb. 299, 299 N.W. 617 (1941).

"A court's task in a child custody case is to determine which parent will better serve the best interests of the child. Myriad factors may be considered in working toward this goal. To hold that a court may not consider religious factors under any circumstances would blind courts to important elements bearing on the best interests of the child." *Bonjour v. Bonjour*, 592 P.2d 1233, 1238 (Alaska 1979).

Also considering whether it is appropriate for a court to consider religion as part of the best interests equation

was the Superior Court of Pennsylvania in *Morris v. Morris*, 412 A.2d 139, 142 (Pa. Super. Ct. 1979): "[B]oth the weight of authority and established legal principles support the proposition that it is legitimate for a court to examine the impact of the parents' beliefs on the child."

We believe that the following beliefs may have an adverse impact on Jaime: (1) The belief that she is illegitimate; (2) The willingness of Carolyn to cut Jaime out of her life if she disobeys the rules of the Tridentine Church; and (3) The racist views held by Carolyn and, apparently, by her church. Although by holding these views Carolyn has not disqualified herself from being a fit and proper person to have custody of her child, we must take all factors into consideration in determining what is in Jaime's best interests. We also note that Carolyn's desire to educate Jaime in the Tridentine school in Coeur d'Alene, Idaho, would interfere with the father's rights of visitation. There is ample evidence that the father is very close to his daughter. He has the ability and desire to take care of her in the family home. He has stated that he will look after her moral and religious training and enroll her in a Sunday school or something equivalent.

We feel that Carolyn's religious beliefs, if continued in regular practice, which she indicates will be the case, will have a deleterious effect not only on the relationship between the father and his daughter but upon the well-being of the child herself. Accordingly, we find that it would be in the best interests of Jaime to place her in the permanent custody of her father, with reasonable visitation rights by the mother.

We therefore reverse the order of the District Court awarding custody to the mother, and remand the cause with instructions to award custody to the father, Dennis Burnham. Carolyn is ordered to pay child support to Dennis in the amount of $50 per month, and will be allowed reasonable visitation.

REVERSED AND REMANDED WITH INSTRUCTIONS.

STATE OF NEBRASKA, APPELLEE, V. WILLIAM E. SODDERS, APPELLANT.

304 N.W.2d 62

Filed April 3, 1981. No. 43574.

1. **Criminal Law: Statutes: Due Process.** In order to comport with due process of law, a criminal statute must be reasonably clear and definite.
2. **Criminal Attempt: Intent.** In order to constitute an attempt to commit a crime under Neb. Rev. Stat. § 28-201 (Reissue 1979), there must be an intentional act on the part of the defendant which would constitute a substantial step toward the completion of the allegedly attempted crime, assuming that the circumstances at the time were as the defendant believed them to be.
3. **Criminal Attempt: Proof.** The determination of whether the defendant's conduct constituted a substantial step toward the completion of the crime is a question of fact.
4. **Statutes.** Difficulty in determining the meaning of the language of a statute does not automatically render it unconstitutionally vague and ambiguous.
5. **Criminal Law: Statutes.** A defendant has no standing to challenge as vague a portion of the language of a statute which does not apply to his conduct when an unambiguous section of the statute clearly applies to such conduct.
6. **Criminal Attempt: Indictments and Informations: Case Overruled.** In the absence of a motion to quash, an information which alleges an attempt to commit an act or acts which if successful would constitute a statutory crime sufficiently charges an attempted crime so as to withstand a jurisdictional attack made for the first time on appeal. To the extent that *Gandy v. The State*, 13 Neb. 445, 14 N.W. 143 (1882), is in conflict with this opinion, it is overruled.

Appeal from the District Court for Douglas County: JAMES M. MURPHY, Judge. Affirmed.

Thomas M. Kenney, Douglas County Public Defender, and Bennett G. Hornstein for appellant.

Paul L. Douglas, Attorney General, and Lynne Fritz for appellee.

Heard before KRIVOSHA, C.J., BOSLAUGH, MCCOWN, CLINTON, BRODKEY, WHITE, and HASTINGS, JJ.

HASTINGS, J.

The defendant, William E. Sodders, pleaded guilty

to the crime of an attempt to commit murder in the first degree and was sentenced to a term of imprisonment of from 15 to 30 years in an institution under the jurisdiction of the Department of Correctional Services. This is a Class II felony for which the maximum sentence is imprisonment for 50 years. Neb. Rev. Stat. §§ 28-201 and 28-105 (Reissue 1979). He has appealed from an order of the District Court overruling his motion to vacate its judgment and sentence. We affirm.

The information filed charged that "on or about the 5th day of March" 1980 "William E. Sodders . . . did . . . purposely and with deliberate and premeditated malice attempt to kill Judith Sodders." The intended victim was the estranged wife of the defendant. The record reveals that the defendant entered his plea of guilty while represented by counsel. His constitutional rights and the consequences of a guilty plea were fully and clearly explained to him by the trial court, and his plea was freely, voluntarily, and knowingly entered. The facts admitted by the defendant were that he had arranged over the phone with some parties to kill his wife for a payment of $5,000, and that he had made a downpayment of $500 to the man who was to accomplish this act. The balance was to be paid after the killing. The defendant was arrested immediately after making the downpayment.

Criminal attempt is defined by § 28-201 as follows:

"(1) A person shall be guilty of an attempt to commit a crime if he:

"(a) Intentionally engages in conduct which would constitute the crime if the attendant circumstances were as he believes them to be; or

"(b) Intentionally engages in conduct which, under the circumstances as he believes them to be, constitutes a substantial step in a course of conduct intended to culminate in his commission of the crime.

"(2) When causing a particular result is an element of the crime, a person shall be guilty of an attempt to commit the crime if, acting with the state of mind

required to establish liability with respect to the attendant circumstances specified in the definition of the crime, he intentionally engages in conduct which is a substantial step in a course of conduct intended or known to cause such a result.

"(3) Conduct shall not be considered a substantial step under this section unless it is strongly corroborative of the defendant's criminal intent."

The necessary elements of the crime of murder in the first degree consist of purposely and with deliberate and premeditated malice killing another person. Neb. Rev. Stat. § 28-303 (Reissue 1979).

The defendant contends that the court was in error in denying his motion to vacate the judgment of conviction because: (1) The information failed to charge the essential statutory elements of the crime; and (2) The statute relating to criminal attempt is unconstitutionally vague.

The defendant's constitutional attack is based upon his assertion that the criminal attempt statute is so complex as to be beyond ordinary comprehension and, as a result, fails to provide adequate notice of what conduct it proscribes. In order to comport with due process of law, a criminal statute must be reasonably clear and definite. *State v. Valencia*, 205 Neb. 719, 290 N.W.2d 181 (1980).

Section 28-201(1)(a) prohibits intentional conduct which is done with the requisite mens rea of the attempted crime, and which conduct would constitute the crime if all of the facts and circumstances were as the defendant believed them to be. For example, if a person purposefully and with premeditated malice aims what is believed to be a properly functioning gun at another and pulls the trigger, intending to kill such person, but the gun misfires, the actor is guilty of attempted murder in the first degree.

In adopting § 28-201(1)(b), our Legislature has accepted the position of the Model Penal Code that attempt liability is primarily concerned with the dan-

gerous disposition of the actor, rather than just the dangerousness of such actor's conduct. However, it recognizes the legal principle that the law does not seek to punish evil thought alone. Therefore, the statute requires that the dangerous disposition be manifested by some intentional act which would constitute a substantial step toward the completion of the crime if the circumstances were as the actor believed them to be. Model Panel Code art. 5, Comments (Tent. Draft No. 10, 1960); Hawaii Rev. Stat. § 705-500, Commentary at 285 (Repl. 1976). Some examples of such conduct might be: Lying in wait for the intended victim; unlawful entry into a structure where it is contemplated that the crime will take place; possession or fabrication of the material necessary to complete the act which finally would constitute the crime; or soliciting an innocent agent to engage in conduct constituting an element of the crime. Ark. Stat. Ann. § 41-701, Commentary at 92-93 (Repl. 1977); Model Penal Code § 5.01 at 48-68 (Tent. Draft No. 10, 1960). The determination of whether the actor's conduct constituted a substantial step toward the completion of the crime is a question of fact. Hawaii Rev. Stat., *supra* at 285. All questions of fact have been resolved against the defendant by his plea of guilty. We believe that the meaning of § 28-201(a)(a) and (b) is abundantly clear.

Subsection (2) of § 28-201 is, at best, perhaps inartfully drafted and unduly complex. However, difficulty in determining the meaning of the language of a statute does not automatically render it unconstitutionally vague and ambiguous. *State v. Valencia, supra.* Beyond that, as applied to the defendant in this case, it adds nothing to subsections (1)(a) and (b). It simply restates that if one purposefully and with deliberate and premeditated malice intends to kill another and engages in conduct which constitutes a substantial step in a course of conduct intending to cause such death, the actor is guilty of attempted murder in the first degree. It does appear to cover an additional situation not ap-

plicable here: where the actor does not intend to cause the specific result but engages in conduct which is *known* by him in the natural progression of events to cause such result, i.e., the actor blows up an occupied building not intending to cause the death of any people yet believing in the inevitability of this result; however, in spite of the explosion, fortuitously no one is injured. Both Arkansas and Hawaii have statutes containing almost identical language to our § 28-201(2), and in their commentaries explain the language "known to cause such a result," as we have above. Ark. Stat. Ann. § 41-701(2), Commentary at 94 (Repl. 1977); Hawaii Rev. Stat. § 705-500(2), Commentary at 284 (Repl. 1976). They also have reckless or negligent homicide statutes which permit prosecution for intentionally engaging in conduct which is known to cause death, although not intending specifically to kill. Ark. Stat. Ann. § 41-1503 (b) (Repl. 1977) provides that one is guilty of murder in the second degree if "he knowingly causes the death of another person under circumstances manifesting extreme indifference to the value of human life." Hawaii Rev. Stat. § 707-702 (Repl. 1976) includes within the definition of manslaughter "if (a) He recklessly causes the death of another person." However, in patterning Nebraska's § 28-201(2) after the criminal codes of Arkansas, Hawaii, or some other state having a similar provision, our Legislature did not see fit to also include nonintentional conduct within its murder definition, as indicated by the examples set forth above. Consequently, the "known to cause such a result" provision would not constitute an element of the crime of attempted murder.

Therefore, although we do not believe that the challenged language amounts to unconstitutional ambiguity, it is superfluous to the prosecution of the defendant here, and § 28-201(1)(b) clearly applies. The defendant has no standing to challenge as vague a portion of the language of a statute which does not apply to his conduct when an unambiguous section of the

statute clearly applies to such conduct. *State v. Shiffbauer*, 197 Neb. 805, 251 N.W.2d 359 (1977).

Defendant's other assignment of error is based in part on our holding in *In re Interest of Durand*, 206 Neb. 415, 293 N.W.2d 383 (1980). In that case we held that the information was wholly invalid because it did not describe a crime. Durand, a minor, was charged under the juvenile statutes with violating the then existing Neb. Rev. Stat. § 28-533 (Reissue 1975) (repealed in 1979), which made it a felony to "willfully and maliciously" enter a dwelling house and attempt to "rob or steal." The information in that case charged only that "said child did willfully and maliciously enter a dwelling . . . with the *intent* to steal." (Emphasis supplied.) We said that "[t]he mere entry of a building with the intent to steal, absent any attempt or the commission of a crime, is without the statute; it is not proscribed by the statute." *Id.* at 417, 293 N.W.2d at 385. Stated another way, paraphrasing from syllabus 1, the mere allegation of an intent to commit a crime, unaccompanied by an allegation of overt acts toward its accomplishment, is defective. Of course, in the instant case, the information alleged more than an intent to commit a crime; it alleged an attempt to purposely and with deliberate and premeditated malice kill another person.

Nevertheless, the defendant insists that in *Gandy v. The State*, 13 Neb. 445, 14 N.W. 143 (1882), a contempt proceeding wherein the information charged that the defendant attempted to hinder the due administration of justice, we said that there is a "necessity of stating the particular acts constituting the alleged attempt." *Id.* at 449, 14 N.W. at 145. The quotation is accurate. However, the distinguishing features of that case are that there was no statutory provision containing a definition of an attempted crime and, furthermore, Gandy had called the court's attention to the alleged defect by moving to quash the information.

As a practical matter, we believe that the information here, coupled with the statutory provisions, ade-

quately informed Sodders of the crime with which he was charged, and was sufficiently definitive so as to permit him to plead the judgment as a bar to a later prosecution. We agree with the reasoning of the Court of Criminal Appeals of Texas in the case of *Green v. State*, 533 S.W.2d 769 (Tex. Crim. 1976), in which the defendant had been charged with attempting to enter a building with intent to commit theft. "While the better practice would be to allege the act constituting the attempt, we do not conclude that the omission is fundamental error to require reversal in absence of a motion to quash. To the extent *Fonville v. State*, Tex. Cr. App., 62 S.W. 573 is in conflict, the same is overruled. Nor do we find that the failure to allege the act deprived the appellant of the opportunity to prepare a defense." *Id.* at 770. See, also, *People v. Miller*, 2 Cal. 2d 527, 42 P.2d 308 (1935); *State v. Wray*, 142 Wash. 530, 253 P. 801 (1927). It cannot seriously be contended, nor is it claimed by the defendant, that he did not understand the conduct with which he was charged or that the same was unlawful.

We hold that, in the absence of a motion to quash, an information which alleges an attempt to commit an act or acts which if successful would constitute a statutory crime sufficiently charges an attempted crime so as to withstand a jurisdictional attack made for the first time on appeal. *Nelson v. State*, 167 Neb. 575, 94 N.W.2d 1 (1959). To the extent that *Gandy v. The State, supra*, is in conflict with this opinion, it is overruled.

Considering the seriousness of the crime attempted, and the defendant's actions to accomplish its completion, we do not believe that the trial court abused its discretion in imposing the sentence which it did in this case.

The judgment and sentence of the District Court are affirmed.

AFFIRMED.

AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES LOCAL 2088, APPELLEE, V. COUNTY OF DOUGLAS ET AL., APPELLANTS.

304 N.W.2d 368

Filed April 10, 1981. No. 43141.

1. **Commission of Industrial Relations: Appeal and Error.** The standard of review by the Supreme Court of orders and decisions of the Commission of Industrial Relations is generally restricted to considering whether the Commission of Industrial Relations order is supported by substantial evidence, whether the Commission of Industrial Relations acted within the scope of its statutory authority, and whether its action was arbitrary, capricious, or unreasonable.
2. **Commission of Industrial Relations: Evidence.** Determinations made by the Commission of Industrial Relations in accepting or rejecting claimed comparables are within the field of expertise of the Commission of Industrial Relations and should be given due deference.
3. ____:____. Factors most often used to determine comparability are geographic proximity, population, job descriptions, job skills, and job conditions.
4. **Commission of Industrial Relations: Evidence: Appeal and Error.** Attempting to arrive at comparables requires granting some discretion to the Commission of Industrial Relations; and unless there is no substantial evidence upon which the Commission of Industrial Relations could have concluded that the counties used by the Commission of Industrial Relations did, indeed, provide comparables, we may not as a matter of law disallow the action taken by the Commission of Industrial Relations.
5. **Commission of Industrial Relations: Evidence.** Where there are local comparisons which can or should be made, they may not be disregarded if in fact it appears from the evidence that the local employers are comparable in that they meet the requirements of Neb. Rev. Stat. § 48-818 (Reissue 1978).
6. ____:____. Whenever there is another employer in the same market hiring employees to perform same or similar skills, the salaries paid to those employees must be considered by the Commission of Industrial Relations unless evidence establishes that there are substantial differences which cause the work or conditions of employment to be dissimilar.
7. **Commission of Industrial Relations: Public Officers and Employees.** No public employer shall withhold pay raises otherwise determined to be granted to public employees in a given year solely on the basis that they are then engaged in a labor dispute over a previous year's wages.

Appeal from the Nebraska Commission of Industrial Relations. Reversed and remanded with directions.

Nelson & Harding, Donald L. Knowles, Douglas County Attorney, H. L. Wendt, and John J. Reefe, Jr., for appellants.

John B. Ashford of Bradford & Coenen for appellee.

Heard before KRIVOSHA, C.J., BOSLAUGH, MCCOWN, BRODKEY, WHITE, and HASTINGS, JJ., and MORAN, District Judge.

KRIVOSHA, C.J.

The appellants, the County of Douglas, Douglas County Social Service Administration, the State of Nebraska, and State of Nebraska Department of Public Welfare, as coemployers (Douglas County), appeal from an order entered by the Commission of Industrial Relations (CIR) fixing compensation to be paid to certain employees of Douglas County employed by the Douglas County Social Service and represented by American Federation of State, County and Municipal Employees Local 2088 (county employees). For reasons more specifically set out hereinafter, we find that we must reverse the order of the CIR and remand the matter to the CIR for further proceedings, if necessary.

American Federation of State, County and Municipal Employees Local 2088 (AFSCME), has been the collective bargaining agent of certain of the employees of Douglas County Social Service Administration since 1973 when it was voluntarily recognized by Douglas County. A collective bargaining agreement was entered into between Douglas County and AFSCME, which remained in effect until July 1, 1976.

On May 5, 1976, prior to the termination of the collective bargaining agreement, this court determined that county-level welfare employees were jointly employed by the State Department of Welfare as well as the respective counties. See *American Fed. of S., C. & M. Emp., AFL-CIO v. County of Lancaster*,

196 Neb. 89, 241 N.W.2d 523 (1976).

Apparently, by reason of our decision, Douglas County refused to negotiate a new contract with AFSCME without the State, and the State refused to recognize AFSCME. A petition for recognition was filed by AFSCME with the CIR. The CIR then joined all the counties of the state as party defendants.

After a hearing, the CIR determined that the appropriate bargaining unit for the county divisions of welfare was a county-by-county unit. An election was ordered in Douglas County. The State had favored a statewide unit. Before an election could be held, the State appealed. This court affirmed the decision of the CIR on July 5, 1978. See *American Fed. of S., C. & M. Emp. v. Counties of Douglas & Lancaster*, 201 Neb. 295, 267 N.W.2d 736 (1978). The AFSCME unit was subsequently elected as collective bargaining representative for Douglas County Social Service employees and proceeded to negotiate wages for 1979-80. Negotiations proceeded until April of 1979 when an impasse developed. After that, Douglas County took the position that no bargaining could take place concerning wages and fringe benefits because these issues were precluded from bargaining due to the state pay plan and Joint Merit System rules and regulations. As a result of the impasse, a petition was filed by AFSCME with the CIR.

Thereafter, Douglas County reconsidered its position and returned to the bargaining table. No agreement could be reached, however, and the action then pending before the CIR was reopened. Both parties presented evidence to the CIR, including various surveys taken of other communities.

Due to the apparent fact that the employees of Douglas County fall into two separate categories, i.e., (1) professional and (2) hourly and clerical workers, different surveys were offered for the two classifications. Both parties used a local survey for hourly and clerical employees and a national survey for

professional-level employees. In addition, Douglas County offered a statewide survey for each category, which the CIR rejected. Douglas County offered its data from what was defined in the record as Standard Metropolitan Statistical Areas (SMSA). Douglas County employees, on the other hand, submitted surveys developed in counties having principal cities similar to the Douglas County/Omaha configuration. Douglas County also tendered one or more Omaha-based employers, other than Douglas County, as comparable on the professional level, and included in its tender for the hourly and clerical employees Omaha-based employers engaged in the insurance and banking industries.

After analysis, the CIR arrived at one array for the professional employees and one array for the hourly and clerical employees. The array developed by the CIR for the professional employees consisted of the counties of: Pulaski, Arkansas; Peoria, Illinois; Polk, Iowa; Tulsa, Oklahoma; Dane, Wisconsin; El Paso, Colorado; Allen, Indiana; Mahoning, Ohio; Jackson, Missouri; and Sedgwick, Kansas. The array for the hourly and clerical workers determined by the CIR consisted solely of employers in the Omaha/Council Bluffs area who were all public employers, nonprofit social service agencies, and nonproprietary hospital corporations. With regard to the professional employees, the CIR rejected as comparables wages paid by Omaha-based employers other than Douglas County to professional employees "for the reason that the consistent low level of salary indicates some non-verbalized difference in the situation of these employers which would make the work, skills and working conditions not comparable." With regard to the hourly and clerical employees, the CIR rejected the banking and insurance employers because, by doing so, "we have a manageable array, having the logical consistency of being public employers, non-profit social service agencies, and non-proprietary

hospital corporations as its base. The inclusion of banks, insurance companies and a miscellaneous service company does not fit with the other categories."

Following its development of the arrays, the CIR entered an order on November 14, 1979, setting the wages for both professional and hourly and clerical employees, all as was more particularly set out in its order. The CIR then compared the fringe benefits and concluded that no adjustment was required for holidays, vacation, health, dental or life insurance, pension amounts, or pension contributions. The CIR did find that Douglas County's accumulation of sick leave was out of step with that obtained in the sample comparables and adjusted the sick leave by increasing the accumulation from 156 days to 185 days.

Douglas County has appealed from that order, assigning some 32 errors allegedly committed by the CIR in entering its order. We now find ourselves, in April of 1981, seeking to determine the appropriate wages to be paid certain employees of Douglas County for the period August 1, 1979, to and including July 30, 1980.

While Douglas County has listed numerous errors, in fact, the critical one concerning the appropriate array for each group may be considered under a broader grouping and a number may be disregarded in view of the action taken by the court in this matter.

Before proceeding, however, to examine the principal assignment necessary for consideration, we believe it is helpful if we once again articulate the rules by which this court reviews the action of the CIR. As recognized by Douglas County in its brief, the standard of review by this court of orders and decisions of the CIR is generally restricted to considering whether the CIR order is supported by substantial evidence, whether the CIR acted within the scope of its statutory authority, and whether its action was arbitrary, capricious, or unreasonable. *State Coll. Ed. Assoc. & Chadron State Coll. v. Bd. of Trustees*, 205 Neb. 107,

286 N.W.2d 433 (1979); *Nebraska Assn. of Public Employees v. State*, 204 Neb. 165, 281 N.W.2d 544 (1979); *American Assn. of University Professors v. Board of Regents*, 198 Neb. 243, 253 N.W.2d 1 (1977). Moreover, we have held that determinations made by the CIR in accepting or rejecting claimed comparables are within the field of expertise of the CIR and should be given due deference. See *Fraternal Order of Police v. County of Adams*, 205 Neb. 682, 289 N.W.2d 535 (1980).

Turning then to the first group of errors assigned by Douglas County, and the one which we believe to be the most critical to our decision, we find a contention by Douglas County that the CIR erred in establishing the array upon which it determined comparables for both professional and nonprofessional employees.

There is no dispute that the CIR was acting within its statutory authority when taking such action. Under the provisions of Neb. Rev. Stat. § 48-811 (Reissue 1978), whenever any public employer and public employee or labor organization find themselves in an industrial dispute with regard to matters such as wages and fringe benefits, either party may invoke the jurisdiction of the CIR.

Neb. Rev. Stat. § 48-818 (Reissue 1978) provides that the CIR may establish or alter the scale of wages, hours of labor, or conditions of employment, or any one or more of the same. In making such finding, the act requires that the CIR establish rates of pay and conditions of employment "which are comparable to the prevalent wage rates paid and conditions of employment maintained for the same or similar work of workers exhibiting like or similar skills under the same or similar working conditions." While the language of the act is extremely clear and concise, the manner in which the CIR is to determine what is comparable to the prevailing wage rate is, under the act, left to a large extent to the discretion of the

CIR. See *Lincoln Fire Fighters Assn. v. City of Lincoln*, 198 Neb. 174, 252 N.W.2d 607 (1977).

The act does not define "comparable" nor specifically direct the CIR in the manner in which it is to make its determination. Our decisions, however, have to some extent given guidance to the CIR. In *Omaha Assn. of Firefighters v. City of Omaha*, 194 Neb. 436, 440-41, 231 N.W.2d 710, 713-14 (1975), after first quoting the provisions of § 48-818, we said: "That portion of the statute remains after an amendment by the Legislature in 1969 deleted language which restricted comparisons to 'the same labor market area and, if known, in adjoining market areas within the state and which in addition bear a generally comparable relationship to wage rates paid and conditions of employment maintained by all other employers in the same labor market area.' . . . A prevalant [sic] wage rate to be determined by the Court of Industrial Relations must almost invariably be determined after consideration of a combination of factors. . . . Under section 48-818, R.R.S. 1943, in selecting cities in reasonably similar labor markets for the purpose of comparison in arriving at comparable and prevalent wage rates the question is whether, as a matter of fact, the cities selected for comparison are sufficiently similar and have enough like characteristics or qualities to make comparison appropriate. Those determinations here were within the field of expertise of the Court of Industrial Relations, were made after a consideration and comparison of all the evidence, and the methods of selection and comparison were in accord with the requirements of section 48-818, R.R.S. 1943."

Likewise, in the case of *Crete Education Assn. v. School Dist. of Crete*, 193 Neb. 245, 252-53, 226 N.W.2d 752, 757 (1975), we attempted to define the word "comparable," saying: "Webster's Third New International Dictionary (Unabr.), p. 461, defines the word 'comparable' as having enough like character-

istics or qualities to make comparison appropriate. However section 48-818, R.R.S. 1943, further refines the definition of 'comparable' and specifies certain items to be considered in determining comparability under that section. The definition as set forth in the above section is, of course, controlling."

We then stated at 255, 226 N.W.2d at 758-59: "The Court of Industrial Relations should not be compelled to compare the same school districts in every case that comes before it involving the same school districts. The ultimate question is whether, as a matter of fact, the school districts selected for comparison are sufficiently similar to the subject district to fulfill the requirements of section 48-818, R.R.S. 1943. If they are, then there is no room for complaint. We are not prepared to say that merely because one set of school districts was deemed adequate in one case, a different set of school districts would necessarily be inadequate in a different case, particularly where different evidence is adduced."

It appears to us that what we have said with regard to school districts is equally applicable with regard to other governmental subdivisions. As a general rule it may be said that factors most often used to determine comparability are geographic proximity, population, job descriptions, job skills, and job conditions. See *Lincoln Fire Fighters Assn. v. City of Lincoln, supra.* Of necessity, attempting to arrive at comparables requires granting some discretion to the CIR; and unless there is no substantial evidence upon which the CIR could have concluded that the counties used by the CIR did, indeed, provide comparables, we may not as a matter of law disallow the action taken by the CIR.

The difficulty in attempting to second-guess the CIR is made apparent when one examines the arguments presented by both of the parties to this action. Each maintains that its particular array was the more appropriate one for reasons urged by that party.

There is, however, no scientific basis upon which one can conclude that one argument is more compelling than the other or that one array is better than the other. We therefore conclude that the CIR did not act arbitrarily or capriciously in using the communities it did in fact use in attempting to arrive at comparable wages.

The rejection by the CIR, however, of other Omaha-based employers of professionals and its further rejection of data concerning hourly and clerical workers employed by Omaha-based employers engaged in the insurance and banking industry pose a different problem and the one upon which we must find the CIR erred.

In *Omaha Assn. of Firefighters v. City of Omaha*, 194 Neb. 436, 440, 231 N.W.2d 710, 713 (1975), we noted: "Prevalent wage rates must of necessity be established by nonlocal comparisons whenever the public employer is the only employer for a specified type of work in a local labor market." It appears to us that it must therefore logically follow that where there are local comparisons which can or should be made, they may not be disregarded if in fact it appears from the evidence that the local employers are comparable in that they meet the requirements of § 48-818. In the instant case, the CIR rejected other Omaha-based employers of professionals performing duties which on their face appeared to be similar to those performed by employees of Douglas County because, as previously noted, "the consistent low level of salary indicates some non-verbalized difference in the situation of these employers which would make the work, skills and working conditions not comparable." The difficulty with that conclusion, however, is that the CIR has apparently determined that the work cannot be similar because the salaries are lower than what the CIR perceives the salary should be. In essence, then, the CIR has made a finding based upon a conclusion which, as the CIR acknowledges, is not supported by

the evidence and is nonverbalized. It may very well be that the CIR is correct in its ultimate conclusion and evidence would disclose that there are sufficient dissimilarities so as to explain the differences in the salaries paid to the employees of the other Omaha-based employers. We do not find, however, any basis in the record upon which the CIR could have reached that conclusion. If, in fact, the county employees believe that the CIR should not consider salaries paid to other social service professionals hired by other Omaha-based employers, then the county employees must bear the burden of producing evidence upon which the CIR may conclude that services performed by other such professionals hired by other Omaha-based employers are not sufficiently similar so as to fall within the meaning of comparable as defined in § 48-818. Until that evidence is produced, however, the CIR may not, in the first instance, rely upon "nonverbalized differences," nor can we conclude that reliance upon "nonverbalized differences" constitutes substantial evidence which would support the action taken by the CIR.

We are uncertain at this point what the effect of including these other Omaha-based employers in the array would be. Regardless of that fact, if relevant, they must be considered. Whenever there is another employer in the same market hiring employees to perform same or similar skills, the salaries paid to those employees must be considered by the CIR unless evidence establishes that there are substantial differences which cause the work or conditions of employment to be dissimilar. Having failed to consider the salaries paid by the other Omaha-based facilities, the order of the CIR in this matter must be reversed.

What we have said with regard to the professionals employed by other Omaha-based employers likewise applies to the hourly and clerical employees. Douglas County tendered to the CIR a number of Omaha-based employers to establish comparable wages for the

hourly and clerical employees. The CIR eliminated from that array private banks, insurance companies, and one miscellaneous company. The CIR concluded that a more manageable array would be arrived at if it used only public employers, nonprofit social service agencies, and nonproprietary hospital corporations as its base. There is, however, no evidence to support the CIR's conclusion that hourly or clerical nonprofessional employees performing work for Douglas County do not perform work which is the same or similar to that performed by hourly or clerical employees employed by insurance companies and banks, both of whom constitute a significant portion of the employee market in Douglas County, or that the conditions of employment are not the same or similar. We are unable to conclude how the CIR determined that other Omaha-based nonprofit employers should be disregarded for the professionals, while at the same time limiting their array to the nonprofit employers for the nonprofessionals. It appears to us that a receptionist, typist, or clerk/typist does, indeed, perform same or similar functions, whether employed by Douglas County or by an insurance company or banking institution. Again, absent evidence to show dissimilarities of work performed, or conditions, the CIR cannot create an array which is not reflective of the local labor market. Excluding private banks, insurance companies, or other private employers solely for the purpose of obtaining a manageable array, having the logical consistency of all being public employees, nonprofit social service agencies, and nonproprietary hospital corporations as its base, is not supported by substantial evidence in the record and likewise must be considered to have been arbitrary and capricious. We believe, therefore, that the CIR erred in not including insurance companies, banks, and other private employers in its array of clerical and hourly employees, absent other clear evidence establishing the contrary.

Douglas County also objects to the CIR using a "key job" classification comparison system in determining the appropriate wages for the various classes of employees. This method has been devised and adopted by the CIR and litigants practicing in this area as a simplified approach to cases which involve large numbers of job classifications. Thus, instead of compiling statistical data for each of 100 job classifications, for example, this approach allows the parties to identify "key classifications" and extrapolate wages for all of the others based on the historical mathematical relationship of the surveyed key classification to the other classifications within each line of progression.

The CIR has developed certain guidelines to be generally followed in using the "key job" classification. Those guidelines, in summary form, are: (1) Job descriptions exist or can be generated; (2) Job descriptions must match within 20 percent from one employer to another; (3) Wage rates surveyed must cover no less than 40 percent of the employees of the respondent employer; (4) Wage rates surveyed must cover not less than 20 percent of the total job descriptions of the respondent employer; (5) "Key classifications" together with related lines of progression must permit direct or computed establishment of at least 85 percent of the classes involved; (6) The "key classifications" or wage rates tendered should have at least one in each regular line of progression, or lines of progression should be established as comparable, or their relative market value established or apparent to the court from its previous experience; (7) The "key classifications" must be subject to checking for accuracy of assessment of job content; (8) The CIR will not average rates of adjustment where more than one classification is surveyed in any one line of progression; and (9) The CIR will not average percentages of all classifications surveyed in order to arrive at one overall percentage of adjustment.

Douglas County asserts that AFSCME failed to satisfy the requirements of guidelines (5) and (6) above. Appellants seem to be arguing that in order for a key classification approach to be valid at least 85 percent of the classes surveyed must be in line of progression. That is simply a misreading of guideline (5). The clear language of the guideline speaks about establishing wage rates of 85 percent of the classes involved in the employer's work force. Thus, what is required is a survey of key classifications designed so that, either by direct comparison or by extrapolated computation, wage rates may be established for 85 percent of the classes.

The positions surveyed by AFSCME, together with an additional position surveyed by Douglas County, fall just short of strict compliance with the 85 percent requirement. However, based upon traditional relationships between the clerical positions surveyed and others which were not, it appears that the CIR concluded that several nonsurveyed positions really fit within one of the clerical lines of progression. Taking that approach, the data offered allowed computation of wages for the required percentage of the job classifications.

We must not lose sight that the "guidelines" used by the CIR are not statutory requirements, and the failure of the evidence to strictly comply with the guidelines does not require us to find that the action of the CIR in developing the "key job" classification was arbitrary and capricious. Guidelines are nothing more than that — a framework whereby the CIR can reasonably develop comparable salaries for multiple positions without having to survey each position. Our examination of all the evidence in this record satisfies us that sufficient compliance with the guidelines were met so as to permit the CIR to reach the conclusions it did in using the "key job" classification.

With regard to guideline (6), it is clear that AFSCME did not have a key classification in every identified

line of progression. Those lines not represented by a key classification are listed in footnote 1 on page 2 of the CIR's opinion. The CIR, in its opinion and order, concluded: "It is apparent here that petitioner does not meet the requirement of one key class in each line of progression, since four or five lines of progression or family job groupings are ignored. [Footnote omitted.] Were it not for respondent's evidence, we would be obligated to evaluate petitioner's data to determine whether it met any of the secondary tests of requirement 6, supra. Here, however, respondent has provided data with which we can work, and we need pursue the technical requirements of a key classification no further." Thus, the requirements of guideline (6) were satisfied by all the evidence taken as a whole. And, secondly, the requirement concerning the lines of progression is only one option of that guideline. There are two other ways to satisfy the guideline. One is when lines of progression within the work force are comparable to one another so that the wages set for one can be used to determine the wages for the other. The other alternative way to satisfy guideline (6) is if the market value for the lines not represented by a key classification is established or readily apparent to the CIR from its own previous experience. Even without Douglas County's evidence, one or the other of these alternatives might have been satisfied. Certainly, a relationship between some of the clerical lines could have been found.

We affirm the use of the "key job" classification by the CIR in arriving at comparable salaries for public employees having a large number of classifications, and further affirm the use of those guidelines developed by the CIR for determining whether the evidence available permits the use of the "key job" classification.

Having so disposed of this issue, it is not necessary for us to give any further consideration to the other numerous errors assigned by Douglas County.

We do believe, however, that one further matter requires comment. Though it was not raised by either party, the record discloses that Douglas County may have granted to county employees not members of AFSCME a raise but withheld the same to members of AFSCME because of the existence of a labor dispute. We believe such practice is both improper and illegal. In a separate opinion in *Lincoln Fire Fighters Assn. v. City of Lincoln*, 198 Neb. 174, 187, 252 N.W.2d 607, 615 (1977), it was correctly observed: "'In an unregulated labor market, labor and management test their relative market power through bargaining. This testing may include resort to the strike or the lockout. However, the Legislature decided that the services provided by employees subject to [the CIR's] jurisdiction were too vital to allow interruption while employer and employees tested the merits of their claims by trial by battle. When discussion is barren, employers and employees in the public sector are routed [to the CIR]. Judicial mandate replaces economic power as the determinate of wages.'" We recognize, therefore, that the public employer and the public employee do not stand on the same footing as employers and employees in the private sector.

The policy of the public sector law in Nebraska is clear. It is to ensure "[t]he continuous, uninterrupted and proper functioning and operation of the governmental service . . . ." See Neb. Rev. Stat. § 48-802 (Reissue 1978). If, on the one hand, employees may not refuse to work without risk of discharge, employers may not refuse to pay employees the wage established by the governmental employer for such work.

Furthermore, Neb. Const. art. XV, §§ 13 and 15, would indicate that public employees may not be discriminated against or punished because they have sought collective bargaining and have reached an impasse with the public employer. In the case of *Local Union No. 647 v. City of Grand Island*, 196 Neb. 693, 244 N.W.2d 515 (1976), it was determined that

any attempt by management to dissuade employees from joining a union is an unfair and unlawful act. To withhold from employees the salary which the governmental employer has determined is at least the minimal appropriate wage for no other obvious purpose but to punish the public employee is not permitted.

Logic indicates to us that the wage to be paid for similar work during a given year to employees not involved in the dispute would be the minimum wage the employer could pay to those involved in the dispute. Any other conclusion would result in the employer favoring nondisputing employees over disputing employees, in violation of Neb. Const. art. XV, §§ 13 and 15.

As an example, if the public employee in this case were to dismiss its suit in the CIR, it would be paid at least that amount which the public employer has determined to be appropriate for all employees in a given year. We therefore fail to see how the existence of a labor dispute in the public sector can authorize the public employer to withhold from the public employee wages which the public employer has publicly declared to be, at a minimum, the appropriate wage for the job performed and to require the public employee to continue performing services at a wage which has been determined for a previous year and which, by the employer's own determination, is below the comparable wage.

It is therefore the order of this court that no public employer shall withhold pay raises otherwise determined to be granted to public employees in a given year solely on the basis that they are then engaged in a labor dispute over a previous year's wages. Such a declaration may, in fact, cause some disputes to become moot. It would occur to us that that would be in keeping with the policy of the entire act and consistent with the Legislature's desire that the public policy of this state be such that there be no interruption of public service. The action of the CIR in the

instant case is reversed and remanded for further proceedings in accordance with this opinion, if necessary.

REVERSED AND REMANDED WITH DIRECTIONS.

BOSLAUGH, J., concurs in result.

MARIO FEOLA, APPELLANT, V. VALMONT INDUSTRIES, INC., A NEBRASKA CORPORATION, APPELLEE.

304 N.W.2d 377

Filed April 10, 1981. No. 43157.

1. **Employment Contracts: Termination of Employment.** Where an employer lawfully terminates the employment of an employee, such term of employment is not extended by the receipt of severance pay benefits provided by the employer. The payment of severance pay by the employer and the acceptance of the same by the employee generally manifests a termination of the employment relationship.
2. _____: _____. In the absence of a promise on the part of the employer that the employment should continue for a period of time that is definite or capable of determination, such employment relationship is terminable at the will of the employer as it constitutes an indefinite hiring. When the employment is not for a definite term and there are no contractual or statutory restrictions upon the right of discharge, an employer may lawfully discharge an employee whenever and for whatever cause he chooses, without incurring liability.
3. **Employment Contracts.** A provision in a contract of employment providing that the employee should have the privilege of terminating his employment at any time, with or without cause, upon written notice, and that the employer should have the same privilege, constitutes a hiring at will.
4. **Evidence: Questions of Law.** Where the essential facts presented in a case are undisputed, the decision becomes a question of law to be decided by the court, and the findings of the trial court are essentially conclusions of law.

Appeal from the District Court for Douglas County: JERRY M. GITNICK, Judge. Affirmed.

Russell S. Daub of Daub, Stehlik & Smith for appellant.

John E. North and Lee H. Hamann of McGrath, North, O'Malley & Kratz, P.C., for appellee.

Heard before KRIVOSHA, C.J., BOSLAUGH, MCCOWN, CLINTON, BRODKEY, WHITE, and HASTINGS, JJ.

BRODKEY, J.

Mario Feola, plaintiff and appellant herein, filed suit in the District Court of Douglas County to recover the sum of $6,500 allegedly due him under the terms of a certain employee bonus plan maintained by his former employer, Valmont Industries, Inc. (Valmont), for the benefit of certain employees of that company, subject to the fulfillment of specified conditions. Plaintiff was employed by defendant company on or about May 5, 1975, as a marketing manager of the Electrical Products Division, his duties consisting primarily of being a salesman for that division. Feola was informed by his superiors in November of 1976 that his employment would be terminated due to a general work force reduction because of economic conditions. Subsequent to that notification, he remained with the company under the terms of its severance pay policy, the stated purpose of which was "to provide fairly for the separation of exempt and non-exempt salaried employees, being terminated at Company convenience, by providing an equitable severance pay as set forth in this policy"; and pursuant to that plan he was paid 10 weeks of severance pay, and was afforded the opportunity of endeavoring to obtain new employment. This pay continued until February 4, 1977, at which time Feola notified Valmont that he had obtained other employment.

Valmont filed an answer to plaintiff's petition, alleging that Feola was not an eligible participant on its payroll on December 25, 1976, as required by the terms of the bonus plan under consideration. During the pendency of the proceedings prior to trial, both the plaintiff and the defendant filed motions for summary judgment, which were denied by Judge

Richling for the reason that there remained genuine issues of material facts to be determined. At the close of the plaintiff's case-in-chief at the subsequent trial, the defendant renewed its motion for summary judgment and also moved for a directed verdict of dismissal, which motions were sustained by the trial judge, who thereafter dismissed the case and discharged the jury. Plaintiff's motion for a new trial was overruled, and he now appeals to this court.

In view of the fact that a partial trial was had after defendant's motion for summary judgment was overruled, we consider the validity of the actions taken by the trial judge, in this case Judge Gitnick, on the basis of the principles of law applicable to motions for directed verdict. In *Foremost Ins. Co. v. Allied Financial Services, Inc.*, 205 Neb. 153, 286 N.W.2d 740 (1980), we set forth the rule as follows: "It is well settled law in this state that the party against whom a verdict is directed is entitled to have every controverted fact resolved in his favor and to have the benefit of every inference that can reasonably be deduced from the evidence. It is only when the facts are conceded, undisputed, or are such that *reasonable* minds can draw but one conclusion therefrom that the trial court must decide the question as a matter of law and not submit it to a jury." See, also, *Novotny v. McClintick*, 206 Neb. 99, 291 N.W.2d 252 (1980); *Woodsmall v. Marijo, Inc.*, 206 Neb. 405, 293 N.W.2d 378 (1980).

In this case a great number of the determinative facts were stipulated between the parties prior to trial, among which were the following:

1. That Mario Feola was employed by Valmont on or about May 5, 1975, under the terms and conditions of a letter from Al Hunt, a personnel representative of Valmont, to Feola dated March 25, 1975. The letter referred to, which was incorporated into the stipulation by reference, after confirming the plaintiff's decision to become employed by Valmont and

setting out the terms of his salary, also provides: "It is our understanding that during your employment with Valmont you will, of course, devote your full time to the interest of Valmont and not be engaged in other commercial pursuits. You shall have the full privilege of terminating your employment with Valmont Industries, Inc. at any time, with or without cause, upon written notice and Valmont shall have the same privilege."

2. During the term of his employment Feola worked as an administrative employee at Valmont.

3. At all pertinent times Valmont had in effect a severance pay policy, No. 274, dated January 1, 1975. A copy of that plan was also incorporated into the stipulation by reference.

4. On December 10, 1976, Tom Whalen (the personnel director for Valmont) sent to Feola a letter enclosing a document entitled "Severance Pay Eligibility Form" to be completed and returned by December 13, 1976. The aforementioned document was returned by Feola, executed by Feola and dated December 10, 1976, and read as follows: "I certify that during the weeks of Nov. 20 - Dec. 3, 1976, and Dec. 6 - Dec. 10, 1976, I have been unable to secure similar employment. I understand that I am receiving severance payments under terms of Policy #274, the contents of which was explained to me on termination. /s/ Mario Feola Returned to Tom Whalen." Identical forms were executed by Feola between December 10, 1976, and January 31, 1977. The December 10, 1976, letter and Severance Pay Eligibility Form were incorporated into the stipulation by reference.

5. Between November 13, 1976, and February 4, 1977, Feola actively sought alternative employment with other firms. On or about January 31, 1977, Feola was employed by Power Enterprises, Inc., of New Orleans, Louisiana.

6. Plaintiff's base rate of pay at Valmont at the time of his termination was $26,000 per year. For the fiscal

year 1976, the earnings per share were $3.60. If plaintiff was eligible under the terms of the plan and if the court finds that the payment was not a gratuity and defendant was thus legally obligated to pay plaintiff a bonus under the plan, plaintiff is entitled to receive a $6,500 bonus. This statement does not constitute a stipulation as to the merit of the defenses raised by defendant that payment under the plan was a gratuity and that plaintiff was not an eligible administrative employee under the plan.

At this point it will be helpful to examine the two plans in effect at Valmont at all times material to this litigation. The bonus plan involved in this litigation was received in evidence as exhibit 3, and entitled "ADMINISTRATIVE BONUS PLAN — 1976." In general, the plan provides that it is applicable to administrative employees of Valmont, and is effective for the year 1976. It states that the purpose of the plan is to build into the compensation plan for administrative employees a direct financial reason for striving continually for more effective operation of the business. It is further provided that the plan shall be administered by the president of the company, and in applying and interpreting the provisions of the plan, his decision shall be final.

Paragraph V of the plan is as follows, and we quote it in full: "V. ELIGIBILITY FOR PARTICIPATION "All Administrative Employees who are not included under another type incentive plan. Payment will be based upon a time period as a percentage of the total twelve months, with the exception that no one employed after October 1, 1976, will be eligible to receive any bonus under the 1976 Bonus Plan."

Paragraph VII is entitled "AMOUNT OF PAYMENTS," and subsection B thereof provides as follows: "B. Allocation to individual employees is subject to individual appraisal; however, total bonus payout under this Plan will remain the same."

Another very pertinent provision contained in the

plan is paragraph X entitled "SEPARATIONS." That paragraph reads as follows: "Payment will be made only to eligible participants who are on the payroll on December 25, 1976, the end of the fiscal year. However, pro-rata payment will be made to participants retiring during the Plan year and to the estates of participants who die during the Plan year."

Finally, paragraph XI, entitled "REVISION OR DISCONTINUANCE OF THE PLAN," provides as follows:

"This Bonus Plan shall not create any rights of future participation therein of any employee nor limit in any way the right of the Board of Directors to modify or to rescind the Plan in whole or in part. No person eligible to receive any payments shall have any right to pledge, assign, or otherwise dispose of any unpaid portion of such payments.

"In the event that the minimum profit level of $2.85 per share for the Fiscal Year 1976 is not met, no bonus will be paid."

We now set out certain pertinent provisions of Valmont's "Severance Pay Policy" as set forth in exhibit 4 received in evidence at the trial. After reciting that the policy and procedure covers severance pay for exempt and nonexempt salaried employees of Valmont and that its purpose is to add to the employees' feelings of economic security, to provide an alternative to retaining employees in the company in excess positions, and also to minimize public relations damage by separated employees, that document, bearing an effective date of January 1, 1975, specifically states that it is the policy of Valmont to provide fairly for the separation of exempt and nonexempt salaried employees, being terminated at company convenience, by providing an equitable severance pay as set forth in the policy.

Section III E thereof specifically provides: "Severance will be made at what would have been the separated employees regular pay intervals until the

allowance is exhausted; except, however, when the separated employee secures other employment at a similar pay rate, severance payments will cease. The separated employee must certify at receipt of each severance that employment has not been secured." Also, section III I provides: "Determination of severance pay and interpretation of this policy shall be the joint responsibility of the department head and the Director of Personnel."

The evidence is undisputed that Feola was originally employed by Valmont under an oral contract of employment, later confirmed by letter, but that the employment contract was not for any specific period of time, nor was there a termination date specified. That being so, it is clear that his employment, under Nebraska law, was terminable at will, even without reference to the specific provision contained in the letter of confirmation of Feola's employment stating that Feola "shall have the full privilege of terminating your employment with Valmont Industries, Inc. at any time, with or without cause, upon written notice and Valmont shall have the same privilege." In the recent case of *Mau v. Omaha Nat. Bank*, 207 Neb. 308, 299 N.W.2d 147 (1980), we stated the rule to be that in the absence of a promise on the part of the employer that the employment should continue for a period of time that is definite or capable of determination, such employment relationship is terminable at the will of the employer as it constitutes an indefinite hiring. We also held in *Mau* that the general rule is that when the employment is not for a definite term and there are no contractual or statutory restrictions upon the right of discharge, an employer may lawfully discharge an employee whenever and for whatever cause he chooses, without incurring liability. It is clear from the specific provisions of the contract of employment of Feola, as well as from the established case law in Nebraska, that Valmont had a perfect right to terminate Feola's employment

and acted within its legal rights in so doing, which the record in this case reveals was done as a result of economic necessity in the reduction of the work force of the company; and plaintiff's contentions to the contrary, as contained in his third amended petition, that he was discharged without "good cause," is clearly without merit.

It is clear that Feola's employment was terminated by the company as of November 26, 1976. It is also clear from the specific provisions of the bonus plan that in order to be eligible for the bonus, Feola had the burden of proving that he was an administrative employee of Valmont on December 25, 1976. By virtue of the stipulation entered into between the parties, there is no dispute that he was an administrative employee of Valmont prior to November 26, 1976. We must, therefore, next consider his status as an employee between November 26, 1976, and February 4, 1977, at which time his benefits under the severance policy ceased and he entered upon the duties of his new employment. The essential question to be determined is whether his participation in the company's severence pay policy after his notice of termination had the effect of extending his employment to and past December 25, 1976.

Plaintiff relies heavily upon the case of *Kruzer v. Giant Tiger Stores*, 39 Ohio Misc. 129, 317 N.E.2d 70 (1974), in support of his contention that he was "on the payroll" as of December 25, 1976. In *Kruzer*, the plaintiff was a former employee of the defendant seeking profit-sharing benefits for 1968. The profit-sharing plan in that case expressly required that to qualify for participation a person must be "in the employ" of the employer on the particular employer's anniversary date, which was specified to be the last day of the particular "plan year." The plaintiff in that case was told on December 6, 1968, that his services were being terminated; but he was, however, paid "final checks and severance pay," representing

the amount of compensation the plaintiff would have been entitled to receive for services through January 4, 1969. The court in *Kruzer* held that the mere continued payment of the equivalent of plaintiff's regular salary constituted the keeping of the plaintiff "in the employ" until the critical anniversary date of the bonus plan, the court stating: "There is no question that the employer here intended, as a voluntary act, to maintain the plaintiff on the payroll until after the first of January, and, therefore, he was in the employ of the defendant on the anniversary plan date of the defendant, although he performed no services." *Id.* at 135, 317 N.E.2d at 74. In his brief on appeal, the plaintiff states that the court in *Kruzer* noted that extensive research failed to disclose any cases directly on point. However, in Shepardizing the *Kruzer* case, we have been able to locate a very recent case taking the opposite view from *Kruzer*, and whose language, reasoning, and statements of law are persuasive. That case is *Compton v. Shopko Stores, Inc.*, 93 Wis. 2d 613, 287 N.W.2d 720 (1980), which case involved an action by an employee to recover an executive bonus where the executive had been discharged for a good cause. The facts involved in *Compton* are similar to those in the instant case, except that in *Compton*, as was also true in *Kruzer*, the employee performed no services for his employer after the date of his discharge. However, the law discussed by the court in *Compton* is pertinent and helpful to a decision in this case. In *Compton*, the Supreme Court of Wisconsin held that his employment ended on the date of discharge for purposes of the employer's rule requiring the executive to be employed at the end of the fiscal year in order to be eligible for the bonus, and the fact that the executive received severance pay for the period ending on the last day of the fiscal year did not extend his employment for purposes of the bonus plan. In its opinion, the court stated at 621-23, 287 N.W.2d at 724-25: "The issue is whether

he was employed by Shopko during this period so as to make him eligible for an executive bonus payment under company rules and policies. Counsel seems to argue that because Compton is not eligible for unemployment compensation benefits, he must be an employee of Shopko. In any event, the Unemployment Compensation Act, in contrast to its definition of 'unemployment,' also defines 'employment' as 'service . . . performed by an individual for pay.' Sec. 108.02(5)(a), Stats. The purpose of the Unemployment Compensation Act is to 'cushion the cruel blow of unemployment,' *Salerno v. John Oster Mfg. Co.*, 37 Wis. 2d 433, 441, 155 N.W.2d 66 (1967); to minimize the loss of income from unemployment, *Kessler v. Industrial Comm.*, 27 Wis. 2d 398, 401, 134 N.W.2d 412 (1965); and to mitigate economic loss to a worker, *Milwaukee Transformer Co. v. Industrial Comm.*, 22 Wis. 2d 502, 511, 126 N.W.2d 6 (1964). If a person is receiving income in the form of severance pay, he has no need for unemployment compensation; the purposes for which unemployment compensation was established are being accomplished by severance pay.

"Severance pay, by definition, means compensation given to an employee upon the severance of his employment relationship with his employer. Contrary to the trial court's conclusion, severance pay does not extend the employment period, but terminates it.

"The general effect of severance pay is discussed in *Annotation, Construction and effect of severance or dismissal pay provisions of employment contract or collective labor agreement*, 40 A.L.R.2d 1044, 1045 (1955):

"'"Dismissal compensation may be defined as the payment of a specific sum, in addition to any back wages or salary, made by an employer to an employee for permanently terminating the employment relationship primarily for reasons beyond the control

of the employee." Such compensation, more recently often referred to as "severance pay," is usually associated with a termination of the employment relationship for reasons primarily beyond the control of the employee; its purpose is to assure a worker whose employment is terminated funds to depend upon while he seeks another job. . . .' (Footnotes omitted.)

"The term 'severance pay' is defined in *Republic Steel Corp. v. Maddox*, 275 Ala. 685, 689, 158 So. 2d 492, 494 (1963), reversed on other grounds, 379 U.S. 650 (1965), as follows:

"'Severance pay, by its very definition, means compensation due an employee, upon the severance of his employment status with the employer. He must accept his discharge as final before any claim for severance pay can be made. A payment of severance pay by the employer and the acceptance of the same by the employee would, in our opinion, be the complete manifestation of the termination of the employment relationship. A claim for severance pay could never arise during the employment relationship of the parties. . .'

"It has also been stated that severance pay is a form of compensation for the termination of the employment relation primarily to alleviate the consequent need for economic readjustment. *Mace v. Conde Nast Publications, Inc.*, 155 Conn. 680, 683, 237 A.2d 360, 361 (1967); *Adams v. Jersey Central Power & Light Co.*, 21 N.J. 8, 13, 14, 120 A.2d 737, 740 (1956). Severance pay is accumulated compensation for past services. *Botany Mills, Inc. v. Textile Workers Union*, 50 N.J. Super. 18, 30, 141 A.2d 107, 113 (1958); *Mace v. Conde Nast Publications, Inc., supra*, at 683, 237 A.2d at 361; *Owens v. Press Publishing Co.*, 20 N.J. 537, 546, 120 A.2d 442, 446 (1956)."

The court also had this to say with reference to the *Kruzer* case relied upon by plaintiff in this action: "Compton places considerable reliance on *Kruzer v. Giant Tiger Stores, Inc.*, 39 Ohio Misc. 129, 317

N.E.2d 70 (1974). This is a county court case and concerns an employee's rights under pension and profit sharing plans. We do not consider it persuasive authority for the proposition that severance pay paid to a discharged employee on the date of discharge extends employment beyond the date of discharge." *Id.* at 623-24, 287 N.W.2d at 725.

In its opinion the court also stated:

"The trial court in the instant case found that the discharge of Compton was for good cause attributable to the employer. This finding is not challenged on appeal, and thus, the cases cited are not applicable. It has been held that where an employee was discharged for good cause prior to distribution of the proceeds of a general bonus plan, the discharged employee was not entitled to participate in the bonus plan. *Molburg v. Hunter Hosiery, Inc.*, 102 N.H. 422, 158 A.2d 288 (1960); *Croskey v. Kroger Co.*, 259 S.W.2d 408 (Mo. App. 1953); *Watwood v. Potomac Chemical Co.*, 57 N.J.E. 631, 42 A.2d 728 (1945). See: *Annotation, Rights and Liabilities as between employer and employee with respect to general bonus or profit-sharing plan*, 81 A.L.R.2d 1066 (1962).

"The contract in this case required Compton to be employed at the end of the fiscal year, February 22, 1975. Since he was not employed by Shopko at that time, he was not entitled to receive a bonus for the 1974-75 fiscal year." *Id.* at 627, 287 N.W.2d at 727.

We also note that in Black's Law Dictionary 1232 (5th ed. 1979) the term "severance pay" is defined as: "Payment by an employer to employee beyond his wages on termination of his employment. Generally, it is paid when the termination is not due to employee's fault and many union contracts provide for it."

In his appeal to this court, plaintiff has contended that, contrary to the finding of the trial court, the bonus plan was not a gratuity but rather was a unilateral contract enforceable by the plaintiff. Since, as we have demonstrated, Valmont was perfectly

within its rights in terminating Feola's employment in response to economic problems in the division, the fact of Feola's termination makes moot any question as to whether the bonus plan was a gratuity or a unilateral contract, since Feola did not satisfy the conditions precedent necessary to be entitled to the bonus. As previously stated in *Compton v. Shopko Stores, Inc.*, 93 Wis. 2d 613, 623, 287 N.W.2d 720, 725 (1980): "A payment of severance pay by the employer and the acceptance of the same by the employee would, in our opinion, be the complete manifestation of the termination of the employment relationship. A claim for severance pay could never arise during the employment relationship of the parties. . ." While plaintiff contends that at least he was "on the payroll" on December 25, 1976, since he was receiving checks for severance pay, we note that the bonus plan specifically provides that payment will be made only to *eligible participants* who are on the payroll on December 25, 1976. The plan, in defining "eligibility for participation," specifically covers *"[a]ll administrative employees* who are not included under another type incentive plan." (Emphasis supplied.) This clearly indicates that to be entitled to a bonus, the applicant must be an employee. As a matter of fact, the plan requires that he be an "administrative employee" on December 25, 1976. As stipulated, it is clear that Feola was an administrative employee up to November 26, 1976; but we conclude that on that date his status as an administrative employee terminated and he obtained a new status as a "separated employee" under the terms of the severance pay policy, the stated purpose of which was principally to afford terminated employees an opportunity to search for new employment and to receive a certain amount of income during that period to support them in their endeavors.

In connection with the effect of an employer's discretionary determination of whether to pay a bonus, see, *Parrish v. General Motors Corporation*, 137

So. 2d 255 (Fla. App. 1962); *Mosow v. National Lock Co.*, 119 Ill. App. 2d 232, 255 N.E.2d 500 (1970); and Annot., 43 A.L.R.3d 503 at 531-32 (1972). We conclude from a review of the terms of defendant's bonus plan and severance pay policy, as well as the evidence presented in the record of this case, that the decision as to whether or not a bonus would be paid was one within the discretion of the president and board of directors of Valmont who, in their discretion, lawfully terminated Feola's employment on November 26, 1976; and we determine that he was not an administrative employee of Valmont on December 25, 1976. In announcing his decision following the trial of this matter, the trial judge stated: "I don't think the contract is ambiguous. I find as a matter of law that the plaintiff was not an administrative employee on December 25, 1976; that as a result, he was not an eligible participant under the term of the Administrative Bonus Plan of 1976 by reason of his termination and severance from employment effective on November 26, 1976." The material facts of this case are essentially undisputed. The law is well settled that in such a situation the case only presents questions of law for the court, and the findings of the trial court are essentially conclusions of law. See *Compton v. Shopko Stores, Inc.*, *supra*. We agree with the conclusions of the trial court and conclude that the trial judge did not err in directing a verdict for the defendant on its motion for directed verdict and his dismissal of plaintiff's petition.

One further matter should be mentioned. Plaintiff also assigns as error the refusal of the trial court to admit the evidence of his witness, Nancy K. Meier, whose testimony was proffered for the purpose of impeaching certain statements made by another witness of the plaintiff, Tom Whalen, the personnel manager of Valmont. The trial court apparently ruled that such impeachment testimony was not permissible during plaintiff's case-in-chief, but could

only be used, if at all, as a rebuttal testimony. The court also based its ruling on the fact that the witness Nancy Meier was not endorsed on the list of witnesses to be called as determined during the pretrial conference. It is, of course, well settled that a witness may be called for impeachment purposes, even though the name was not listed among the witnesses to be called by a party in establishing its case-in-chief. However, we believe the court erred in its conclusion that the impeachment must be done during rebuttal evidence, and was not permissible during the case-in-chief. Be that as it may, however, the plaintiff made an offer of proof as to the nature of the testimony which would have been given by the witness Nancy Meier. The offer of proof failed to show that witness Meier would have testified that she was receiving severance pay on or before December 25, 1976, as was the plaintiff, when she received a bonus from the company nor that she was employed in the division for which Mr. Whalen had responsibility. The offer failed to include a statement that she was a "separated employee" on that date, which would indicate she was not in a separated status, but was still regularly employed in an administrative capacity. We conclude that the error, if any, was without prejudice to plaintiff's case, and that the assignment of error is without merit.

In view of what we have stated above, the judgment of the trial court must be, and hereby is, affirmed.

AFFIRMED.

ROBERT NIELSEN ET AL., APPELLANTS AND CROSS-APPELLEES, V. SANITARY AND IMPROVEMENT DISTRICT NO. 229 OF DOUGLAS COUNTY, NEBRASKA, ET AL., APPELLEES, HAWKINS CONSTRUCTION COMPANY, APPELLEE AND CROSS-APPELLANT, FIRST FEDERAL SAVINGS AND LOAN ASSOCIATION OF LINCOLN, INTERVENOR-APPELLANT.

304 N.W.2d 385

Filed April 10, 1981. No. 43301.

1. **Sanitary and Improvement Districts: Derivative Actions.** In a derivative action by a taxpayer on behalf of a sanitary and improvement district the taxpayer has no rights greater than the rights the district itself possesses.
2. **Sanitary and Improvement Districts: Special Assessments.** In order to render an assessment for improvements valid, the improvements may be constructed only on land in which the public has title or at least a valid easement.
3. **Res Judicata.** For purposes of res judicata, a judgment decides all issues essential to support it and those assumed or decided in leading to and supporting the final conclusion as well as the ultimate decision.
4. ——. Any right, fact, or matter in issue, and directly adjudicated upon, or necessarily involved in, the determination of an action before a competent court in which a judgment or decree is rendered upon the merits is conclusively settled by the judgment therein and cannot again be litigated between the parties and privies whether the claim or demand, purpose, or subject matter of the two suits is the same or not.
5. **Judgments: Collateral Attack.** As a general rule, domestic judgments cannot be collaterally attacked or impeached by the parties for fraud or collusion not going to the jurisdiction, and consent judgments are as conclusive on collateral attack as judgments rendered after trial.
6. **Judgments.** In cases involving public interests where the public was a party merely by representation, the persons represented may show fraud or collusion in obtaining the judgment.
7. **Appeal and Error.** Questions not presented to or passed upon by the trial court will not be considered on appeal.

Appeal from the District Court for Douglas County: DONALD J. HAMILTON, Judge. Affirmed.

Daniel G. Dolan of Daniel G. Dolan, P.C., and August Ross of Ross & Mason for appellants Nielsen.

John W. Delehant and James D. Sherrets for intervenor-appellant First Federal.

Walsh, Walentine, Miles, Fullenkamp & O'Toole for appellee SID.

Dennis E. Martin and Edward F. Pohren of Dwyer, O'Leary & Martin, P.C., for appellee Hawkins.

Heard before KRIVOSHA, C.J., BOSLAUGH, MCCOWN, BRODKEY, WHITE, and HASTINGS, JJ.

MCCOWN, J.

This is an action by plaintiffs on behalf of themselves and all taxpayers in Sanitary and Improvement District No. 229, to declare void and enjoin the payment of warrants issued by the district to defendant Hawkins Construction Company for the construction of certain improvements, including paving, sewers, and related work. The District Court found that plaintiffs had no greater right than the sanitary and improvement district to assert the invalidity of the warrants, and that plaintiffs' claims were barred by certain consent decrees previously entered into between Sanitary and Improvement District No. 229 and the mortgagees and owners of the property on which the improvements were constructed. The District Court dismissed the plaintiffs' petition and this appeal followed.

Plaintiffs are the owners of a residence located within the boundaries of Sanitary and Improvement District No. 229 of Douglas County, Nebraska, which was duly formed on December 1, 1971. Among the petitioners for the creation of the district were the developers of The Knolls apartment complex, a joint venture formed by Edward E. Wilczewski and Hawkins Investment Co. Limited Partnership No. 1. The developers were the owners of property in The Knolls Addition which is the subject of this action.

Following the creation of the district the developers requested the board of trustees of the district to

construct certain pavement, sewer, and other public improvements on dedicated rights-of-way or on permanent easements. No written easements were given. The then constituted board of trustees of the district approved a resolution of advisability and necessity to construct the improvements in dedicated rights-of-way on the properties owned by the developers. On August 25, 1972, following public bidding in which Hawkins was the low bidder, the board of trustees of the district accepted the bid of Hawkins Construction Company in the sum of $984,573.26.

The warrants the plaintiffs seek to void were issued by the district to Hawkins as the work progressed upon receipt of pay order estimates from the engineering firm supervising the construction. Hawkins did not retain the warrants but sold them to Chiles, Heider & Co., which in turn sold the warrants to the general public. Current warrant holders have not been paid nor have they been joined as parties in this litigation.

Subsequent to the construction of the improvements in question, as well as the construction of three apartment complexes, the developers met with financial difficulties and the separate tracts of land on which the apartment complexes are located were foreclosed and purchased at the foreclosure sale by the respective mortgagees, Occidental Life Insurance Company, First Federal Savings and Loan Association of Lincoln, and Banco Mortgage Company.

On November 17, 1977, the then board of trustees of the district levied special assessments against the three properties then owned by the three lending institutions for the total project cost, including engineering and legal costs, plus interest, in the total amount of $1,569,311.22. The respective benefits sought to be apportioned against the owners were: Occidental Life Insurance Company, $433,185.83; First Federal Savings and Loan Association, $759,641.23; and Banco Mortgage Company, $376,484.16.

Each of the three owners thereafter appealed the assessment to the District Court for Douglas County and each alleged, among other things, that the improvements which formed the basis for the special assessments were constructed on private rather than public property, and that the levy and assessments were therefore void. The district's answers affirmatively alleged that predecessors in title had given both oral and written dedications to the district across the property upon which the improvements were made.

The parties entered into settlement negotiations in each of the three cases and on December 8, 1977, the District Court entered a consent decree in each case finding that the properties were not specially benefited to the extent levied and that each assessment should be reduced to a specific amount which was to be paid on or before December 12, 1977. The amounts in each case were: Occidental Life Insurance Company, $165,757.40; First Federal Savings and Loan Association, $411,124.37; and Banco Mortgage Company, $151,157.67. The total settlement amount was $728,039.44. Collateral to the decrees the three lending institution owners released the district from its future responsibility to maintain the improvements, and the district assigned whatever claim the district may have had because of defects in the improvements to the owners.

There was evidence that the settlement was beneficial to the district. There was a genuine question as to the validity of the assessments. There was evidence that had the assessment been made in accordance with standard subdivision practice, approximately $345,000 of the total amount would have been a general obligation of the district rather than being assessed against the three particular property owners involved. There was also evidence that the yearly maintenance cost assumed by the three property owners would be $10,000 to $12,000 per year and that

because the settlement amount was paid immediately in cash rather than spread over 10 years, the district achieved a benefit of $234,000 in connection with the sale of its bonds.

At the conclusion of the trial in the case at bar the District Court found that a substantial amount of the improvements involved here were constructed on private property, did not constitute public improvements within the authority of the district, and were, in fact, for the use and benefit of the developers. The court also found that the three owners and mortgagees did not give the district valid easements for the construction of the improvements and that no easements existed by operation of law.

The District Court also found that the plaintiffs had no right to assert the claim of invalidity of the warrants and the construction work since they had no greater right than Sanitary and Improvement District No. 229, and that the plaintiffs' claims in the case at bar were barred by the consent decrees entered into by the district and the mortgagees and owners of the private property in the assessment cases.

Finally, the court found that the consent decrees entered by the District Court in the Occidental, First Federal, and Banco cases were binding and conclusive on the issues raised by the plaintiffs in the case at bar, and that it is implicit in the findings in those three respective lawsuits that the question of improvements constructed on private property as asserted by the plaintiffs in the case at bar was decided by the District Court and therefore precluded from determination in the case at bar. The District Court therefore dismissed plaintiffs' petition and this appeal followed.

The petition of First Federal Savings and Loan Association, which had intervened, seeking a conditional refund of special assessments paid under the consent decree, was also dismissed.

The action here is essentially a derivative action by the plaintiffs as resident taxpayers of the district. In such a derivative action by a resident taxpayer on behalf of the sanitary and improvement district, the plaintiffs have no rights greater than the rights the district itself possesses. *Pedersen v. Westroads, Inc.*, 189 Neb. 236, 202 N.W.2d 198 (1972). See, also, 64 C.J.S. *Municipal Corporations* § 2138(a) (1950); 74 Am. Jur. 2d *Taxpayers' Actions* § 2 (1974).

In the case at bar the plaintiffs assert on behalf of the district that certain construction work was done on private property rather than public property, and request that warrants issued in payment therefor be declared void. It is well established that in order to render an assessment for improvements valid, the improvements may be constructed only on land in which the public has title or at least a valid easement. *Metropolitan Life Ins. Co. v. SID No. 222*, 204 Neb. 350, 281 N.W.2d 922 (1979); 14 McQuillin, Municipal Corporations § 38.179 (3d ed. 1970).

The evidence in the case at bar included the complete court record of the three cases involving the consent decrees which the district contends resolved the issue of public or private property. Those three cases involved the same construction work and improvements involved in this case, and in each case the specific issue of whether the improvements were located on public or private property was raised and in issue. The consent decrees reduced the special assessments made on the basis that the lands had only been specially benefited to the extent of the amounts set out in the decrees. There can be no doubt that the decrees, in determining that the respective special assessments were valid in the reduced amounts, necessarily and implicitly determined that the improvements involved were constructed on public rather than private land. Such a finding was necessary to support each judgment and the trial court in the present case so found. The district, as a party

to those three cases, is bound by the decrees, and it is also clear that a taxpayer plaintiff in a derivative claim on behalf of a governmental body is bound by all findings and orders to the same extent that the governmental body is bound. See *Pedersen v. Westroads, Inc., supra.*

For purposes of res judicata, a judgment decides all issues essential to support it and those assumed or decided in leading to and supporting the final conclusion as well as the ultimate decision. *Norlanco, Inc. v. County of Madison*, 186 Neb. 100, 181 N.W.2d 119 (1970).

Any right, fact, or matter in issue, and directly adjudicated upon, or necessarily involved in, the determination of an action before a competent court in which a judgment or decree is rendered upon the merits is conclusively settled by the judgment therein and cannot again be litigated between the parties and privies whether the claim or demand, purpose, or subject matter of the two suits is the same or not. *Vantage Enterprises, Inc. v. Caldwell*, 196 Neb. 671, 244 N.W.2d 678 (1976).

The plaintiffs acknowledge that the general rule with respect to domestic judgments is that they cannot be collaterally attacked or impeached by the parties for fraud or collusion not going to the jurisdiction, and that consent judgments are as conclusive on collateral attack as judgments rendered after trial. Plaintiffs contend, however, that in cases involving public interests where the public was a party merely by representation, the persons represented may show fraud or collusion in obtaining the judgment, and they rely upon the case of *Warren v. County of Stanton*, 145 Neb. 220, 15 N.W.2d 757 (1944).

The *Warren* case adopted the general rule and recognized the public interest exception where there was fraud or collusion in obtaining the judgment. The *Warren* holding as to fraud or collusion has no application here. In the case at bar plaintiffs did not plead

any fraud or collusion by the parties to the consent decrees. There was no evidence of fraud or collusion at trial, nor was the issue raised or argued in the District Court. Questions not presented to or passed upon by the trial court will not be considered on appeal. *Powers v. Chizek*, 204 Neb. 759, 285 N.W.2d 501 (1979).

In view of our holdings it is unnecessary to consider the issues raised in the cross-appeal of defendant Hawkins Construction Company.

The judgment of the District Court was correct and is affirmed.

AFFIRMED.

KRIVOSHA, C.J., concurs in result.

CLINTON, J., participating on briefs.

IN RE INTEREST OF COOK, A CHILD UNDER 18 YEARS OF AGE. STATE OF NEBRASKA, APPELLEE, V. YVONNE COOK, APPELLANT.

304 N.W.2d 390

Filed April 10, 1981. No. 43388.

Parental Rights. Parental rights may be terminated when the parents have substantially and continuously or repeatedly neglected the child; have refused to give the child necessary parental care and protection; and such action is in the best interests of the child. Neb. Rev. Stat. § 43-209 (Reissue 1978).

Appeal from the Separate Juvenile Court of Douglas County. Affirmed.

Steven Lefler for appellant.

Donald L. Knowles, Douglas County Attorney, and W. Mark Ashford for appellee.

Heard before KRIVOSHA, C.J., BOSLAUGH, MCCOWN, CLINTON, BRODKEY, WHITE, and HASTINGS, JJ.

BOSLAUGH, J.

Yvonne Cook appeals from an order of the separate juvenile court of Douglas County, Nebraska, terminating her parental rights over her child.

Yvonne Cook and Joseph Cook are the natural parents of a child who was born February 20, 1973. A petition was filed in the juvenile court on August 24, 1979, which, as amended, alleged that the child was lacking proper parental care because of sexual molestation and manipulation by her father. The petition set out specific incidents which had occurred on March 22, 1977, and August 8, 1979, and alleged that numerous incidents had occurred between those dates and that Yvonne had failed to remove the child from the environment created by the father. At the adjudication hearing on November 27, 1979, Yvonne admitted these allegations were true.

The child was placed in foster care by the juvenile court on the date the petition was filed. After an evidentiary hearing on September 10, 1979, the detention was continued over the opposition of both Yvonne and Joseph. An adjudication hearing was held on November 27, 1979, and the parental rights of Yvonne and Joseph were terminated on January 29, 1980. Yvonne and Joseph appeared in person at the hearings and were represented by separate counsel. The child was represented by a guardian ad litem. Only Yvonne appeals from the order of January 29, 1980, terminating parental rights.

Parental rights may be terminated when the parents have substantially and continuously or repeatedly neglected the child; have refused to give the child necessary parental care and protection; and such action is in the best interests of the child. Neb. Rev. Stat. § 43-209 (Reissue 1978).

There is little or no dispute concerning the facts in this case. The evidence shows that the sexual molestation or abuse of the child by her father commenced at about the time she began to walk, at approxi-

mately 18 months of age, and continued until the time that she was placed in foster care. The molestation included fondling, kissing, oral sex, attempted intercourse, and masturbating in the presence of the child.

When Yvonne complained to Child Protective Services on August 9, 1979, she knew that the molestation had been going on for more than 2 years. She testified that the child complained to her in March 1977. Yvonne testified concerning a third incident which had occurred in January 1979 and admitted that the child had complained to her before March 1977. After the complaint by the child in March 1977 Yvonne confronted Joseph and contacted Child Protective Services, which suggested counseling. Approximately 1 month later Joseph admitted that he had been molesting the child since she was 18 or 19 months old and sought counseling. The counseling, however, consisted of only one or two conferences. Joseph did not again seek counseling until after the incident in January 1979. It is apparent that counseling was ineffective to stop the molestation and abuse.

After the August 8, 1979, incident Yvonne refused to cooperate with the police officers who contacted her and refused permission for the officers to speak with the child or for the child to be examined by a physician. The child at that time was complaining of irritation and discomfort while urinating. Yvonne suggested the condition was due to insufficient bathing and soiled underwear.

The record shows that Yvonne was more interested in preserving her relationship with Joseph than in protecting the child. The fact that Yvonne claimed ignorance of but a few of the incidents that had occurred demonstrated her inability to deal with the realities of the situation. She was unwilling to do anything to remedy the situation other than urge Joseph to seek counseling and attempt to be more "watchful" of the child. Although Yvonne and the

other children moved to her mother's home after the August 1979 incident, she has not told her mother the reason why the child was placed in foster care.

The evidence shows that the child has progressed very well in foster care. Although the nightmares which she suffered while living at home continued for a while, she now appears to have made a satisfactory adjustment.

There is some indication in the record that Yvonne and Joseph separated in September 1979. At the hearing on the motion for new trial on March 19, 1980, counsel stated that Yvonne had commenced a dissolution proceeding. Without regard to what may have happened or may happen in that proceeding, there is no assurance that Joseph will not return to the home at some future time. The other children in the family were not affected by this proceeding. The record indicates Yvonne would hope to reunite the family.

As we view the record, it was in the best interests of the child that the parental rights of both parents be terminated. The judgment is therefore affirmed.

AFFIRMED.

KRIVOSHA, C.J., dissenting.

I regret that I must once again dissent with the majority of the court in this case concerning the matter of terminating parental rights. While I do not for a moment minimize the seriousness of the matter, either generally or in this case, I believe that the court has resorted to means more drastic than are necessary under the facts in this case.

Before an order of the juvenile court terminating parental rights under Neb. Rev. Stat. § 43-209 (Reissue 1978) may be upheld by this court, the action taken by the lower court must be supported by clear and convincing evidence. See, *State v. Wedige*, 205 Neb. 687, 289 N.W.2d 538 (1980); *In re Interest of Morford*, 207 Neb. 627, 300 N.W.2d 795 (1981). I do not believe

that the record in this case will establish by clear and convincing evidence that the parental rights of the mother should be terminated.

No one who testified in this case suggested such action should be taken. As a matter of fact, all of the evidence offered in the case indicates that the visitation rights of the mother should be continued.

A report dated January 16, 1980, signed by Ann Campion, service officer; John Tiedeman, guardian ad litem; and Gladys Haines, Child Protective Services worker, and offered into evidence, recommended that, while the minor child be placed in the custody of the State Department of Public Welfare for continued foster care placement, the mother, nevertheless, continue to have regular visitation with the child. A report filed by the Douglas County Welfare Administration dated January 23, 1980, and offered into evidence, likewise recommended that the mother continue to have rights of visitation with the child. Neither report recommended that her parental rights be terminated.

A report dated January 21, 1980, prepared by Dr. K. J. Kenney, center director for Immanuel Community Mental Health Center, and offered into evidence at the hearing held on January 29, 1980, indicated that the father and mother have been obtaining outpatient counseling since September 1979 and "they have made excellent progress." The report goes on further to provide: "Both Mr. and Mrs. Cook have made great strides in resolving the problem. They each recognize, at the present time, that the reason for Mr. Cook's deviant behavior was his anger towards his wife Yvonne. This anger has been worked through satisfactorily and the two of them are, at the present time, getting along very well." Dr. Kenney's report concludes as follows: "Therefore, my recommendation would be the resumption of their living as a married couple, in their own house, with their daughter, and a continued family therapy program

established either with Dr. Dahlke, or with us here at Immanuel Community Mental Health Center, for at least six months. If this program should be carried out here, we would be happy then to supply you with further information as to the progress the family has made."

The guardian ad litem likewise urged the court not to terminate the rights of the mother.

The majority relies, to some extent, on the fact that the mother, though aware of what was taking place, did not remove herself and the child from the home immediately.

While we might have hoped that such action would have occurred, we must not, nevertheless, fail to recognize the realities of life. A moderately educated woman with small children, no means of support, and no place to go does not quickly remove herself from the family home for whatever reason.

Moreover, the evidence discloses that, when the episode apparently first occurred, the mother contacted Child Protective Services and advised them of what was taking place. At that point Child Protective Services did not recommend that she remove herself or the child from the home, but, rather, suggested that the entire family seek counseling. If the failure to remove the child was so negligent as to justify our terminating her parental rights, why did not Child Protective Services see the problem and suggest to the woman she take such action, rather than apparently assure her that she could remain in the family home if she sought counseling?

We must not lose sight of the fact that this entire matter came to light because the mother did, in fact, remove the child from the home. While it is true she should have done it sooner, we should not overlook the fact that she did, in fact, take such action and report the matter to the police. We now reward her for having finally acquired the necessary strength to act by terminating her parental rights.

I do not believe that the evidence in this case is clear and convincing that the mother has acted in such a manner that she has, indeed, lost her parental rights or that the best interests of the child, under the facts, demand that she be separated from her mother and two brothers. As I noted in my dissent in *In re Interest of Goodon, ante* p. 256, 262, 303 N.W.2d 278, 281 (1981): "The options available to the juvenile court, short of terminating parental rights for the best interests of the child, are many. See Neb. Rev. Stat. § 43-210 (Reissue 1978)." Where, as here, the evidence indicates that the mother has sought and obtained counseling and is making progress, and the child has had counseling and is making progress, I would have been inclined to follow the recommendations of the professionals and the urging of the guardian ad litem and delayed terminating the parental rights of the mother in this case for at least an additional 6 months to see whether the mother and her child could not have been successfully reunited.

STATE OF NEBRASKA, APPELLEE, V. MELL T. WOSTOUPAL, APPELLANT.

304 N.W.2d 393

Filed April 10, 1981. No. 43529.

1. **Contempt: Affidavits.** Contempts may be prosecuted by affidavit, and such an affidavit serves the purpose of a pleading.
2. ____: ____. Where the reading of an affidavit for contempt clearly indicates that the alleged violation of a court order was willful, the failure to use that express word does not render the affidavit defective.
3. **Contempt: Pleas: Waiver.** The voluntary entry of a plea of guilty to a charge of contempt waives formal defects in the information, affidavit, or accusation.

Appeal from the District Court for Stanton County: MERRITT C. WARREN, Judge. Affirmed.

Vince Kirby for appellant.

Paul L. Douglas, Attorney General, and Robert F. Bartle for appellee.

Heard before KRIVOSHA, C.J., BOSLAUGH, MCCOWN, CLINTON, BRODKEY, WHITE, and HASTINGS, JJ.

CLINTON, J.

Defendant, Dr. Mell T. Wostoupal, a veterinarian and owner of Oink, Inc., appeals from an order by the District Court for Stanton County holding him in contempt for violating a court order which enjoined the movement of swine off the Oink, Inc., premises except under specified conditions. Defendant assigns as error on appeal that the contempt proceedings against him were defective because the accusation filed by the State was not notarized. We affirm.

A short factual summary is necessary to understand defendant's assignment of error. On March 27, 1978, the Nebraska Department of Agriculture, acting on information from the Missouri Department of Agriculture, Animal Health Division, concerning pseudorabies found among swine transported to Missouri, issued a quarantine restricting any movement of swine from the Oink, Inc., premises "other than direct to slaughter . . . until the entire swine herd" was "tested negative under either State or Federal supervision." The Department of Agriculture amended the quarantine 3 days later to cover all swine owned by Oink, Inc., and defendant in Stanton County. Defendant received the quarantine notice on March 31, 1978.

In August 1978 the State, acting on behalf of the Department of Agriculture, petitioned for an injunction against the movement of swine from Oink, Inc. The State's petition alleged various violations of the abovementioned quarantine. Following a hearing, the District Court issued a temporary injunction on August 21, 1978. Four months later, on December 5, 1978, a permanent injunction was issued pursuant to a stipulation

made by both parties. The permanent injunction set forth specific conditions under which swine could be moved from Oink, Inc.

During January 1980 the State filed an affidavit and motion for contempt against defendant. The affidavit, which was properly notarized and set forth the terms of the court's order of injunction, alleged that defendant had *intentionally* violated the conditions set forth by the permanent injunction in 23 separate instances. For each alleged violation the affidavit named the number of swine moved, to whom they were sold, and the location where they were sent and that they were sold as feeder pigs. The District Court issued a show cause order. Following a hearing the court ordered the State to file a written accusation against defendant. The State filed an unnotarized accusation 6 days later which summarized the permanent injunction, stated the alleged violations, specified damages caused by the alleged violations, and prayed that defendant be found guilty of contempt. The accusation differed from the affidavit in that instead of using the words "intentionally disregarded," it used the terms "knowingly, willfully, contumaciously, and contemptuously refused to obey." Defendant demurred on six grounds and also filed a motion to dismiss. None of the grounds alleged in either defendant's demurrer or motion are the same as the error which he assigns in this appeal. The demurrer and motion to dismiss were overruled after a hearing on March 7, 1980. One week later, defendant pleaded that he had violated the permanent injunction and consented to a finding that he was guilty of contempt. The court found defendant guilty of contempt, laid down conditions under which he could purge himself, and deferred sentencing. Three months later, after several proceedings which are not the subject of this appeal, defendant was sentenced to 3 months in jail upon the court's finding that he had failed to purge himself of contempt.

Defendant argues that contempt proceedings, for

contempt committed outside the presence of the court, must be initiated by an information or accusation and affidavit alleging the specific facts constituting contempt; both pleadings, he claims, must be properly verified, hence, the finding that he is in contempt is void because the accusation filed by the State was not notarized.

The record clearly shows that the State filed a properly notarized affidavit and motion for contempt before filing its accusation. There is no question raised as to the affidavit's verification, hence, no jurisdictional issue of the type mentioned in *Belangee v. State*, 97 Neb. 184, 149 N.W. 415 (1914), and *Herdman v. State*, 54 Neb. 626, 74 N.W. 1097 (1898), is presented. Likewise, no issue concerning the sufficiency of the affidavit and motion for contempt in providing defendant with notice as required under Neb. Rev. Stat. § 25-2122 (Reissue 1978) is raised. Furthermore, this court has recognized the propriety of notifying a party to criminal contempt through an affidavit for contempt and a motion to hold in contempt as was done here. *Sempek v. Sempek*, 198 Neb. 300, 252 N.W.2d 284 (1977). There we held: "Contempts may be prosecuted by affidavit, and such an affidavit serves the purpose of a pleading. . . . Where the reading of an affidavit for contempt clearly indicates that the alleged violation of a court order was willful, the failure to use that express word does not render the affidavit defective." (Syllabi of the court.)

Only the issue of the State's failure to have the court-ordered accusation notarized is presented in this appeal. This court has held that formal defects in an information are waived by a defendant in a criminal contempt action if he fails to object to such defects before proceeding to trial. *Zimmerman v. State*, 46 Neb. 13, 64 N.W. 375 (1895) (overruled on other grounds). See, also, 17 C.J.S. *Contempt* § 74, pp. 191-92; *The People v. Severinghaus*, 313 Ill. 456, 145 N.E. 220 (1924). Defendant did not object to the State's failure to have the

accusation against him notarized before he pleaded guilty to it and proceeded to judgment. He thereby waived his right to raise the defect on appeal.

AFFIRMED.

LOWELL A. JONES, APPELLANT, V. VALLEY COUNTY BOARD OF EQUALIZATION ET AL., APPELLEES.

304 N.W.2d 396

Filed April 10, 1981. No. 43561.

1. **Taxation: Appeal and Error.** Relief from the overassessment of property for tax purposes is by appeal to the District Court from the order of the county board of equalization fixing the assessed value of the property, and the remedy thus given is full, adequate, and exclusive.
2. **Taxation: Collateral Attack.** A collateral attack may be made upon an assessment of property for tax purposes only if the assessment or some part thereof is wholly void.
3. **Declaratory Judgments: Taxation.** A declaratory judgment action is not an appropriate remedy to attack an assessment of real property made by the county board of equalization.

Appeal from the District Court for Valley County: JAMES R. KELLY, Judge. Affirmed.

Donald H. Weaver of Anderson, Vipperman, Weaver, Hinman & Hall for appellant.

Paul L. Douglas, Attorney General, Ralph H. Gillan, and Gregory G. Jensen, Valley County Attorney, for appellee.

Heard before KRIVOSHA, C.J., BOSLAUGH, MCCOWN, CLINTON, BRODKEY, WHITE, and HASTINGS, JJ.

MCCOWN, J.

This is an action for a declaratory judgment seeking to have the 1979 increase in real property tax assessments in Valley County, Nebraska, declared void. The

District Court entered judgment in favor of the defendants and dismissed plaintiff's petition.

The plaintiff, in various capacities, is the owner of numerous tracts of real property located in Valley County, Nebraska. In 1977 Valley County contracted with an appraisal company for a reappraisal of real estate in Valley County. The values of real property reflected by the appraisals were put into effect by the county assessor and the board of equalization in 1979 and notice of increases in assessment valuation of real property was given as required by statute. Plaintiff appeared before the Valley County Board of Equalization and protested the increased assessments. The county board rejected plaintiff's complaints and he perfected his appeals to the District Court.

The State Board of Equalization and Assessment, after receiving abstracts of assessment from the various counties, determined that increases in valuations of real property of some of the counties, including Valley County, were required. Notice of proposed increases to be made by the state board were given and equalization hearings were thereafter held at which Valley County appeared and objected to the proposed increases. On August 6, 1979, the state board entered its order raising the valuations on certain classes of real property in Valley County and the order was certified to Valley County as required by law. The plaintiff did not appear before the state board, nor did he attempt to appeal from the order of that board.

On August 28, 1979, the plaintiff filed this action in the District Court for Valley County, seeking a declaratory judgment that the increased assessments of real property in Valley County in 1979 were void because the county and state boards of equalization and assessment and the county and state taxing officials failed to comply with various statutorily authorized rules and regulations in the valuation and assessment of Valley County property in 1979. Following requests for admissions the defendants filed a motion for summary judgment which was overruled.

At trial plaintiff introduced evidence tending to show that various rules and regulations of the Department of Revenue dealing with procedures for the appraisal classification and valuation of real property had not been complied with by Valley County. The plaintiff also asserted that the order of the State Board of Equalization and Assessment with respect to Valley County real property was void because of vagueness. The defendants introduced no evidence but stood on the motion for summary judgment.

The District Court found that the rules and regulations allegedly violated by the county board of equalization were not applicable in this case and that the collateral attack on the action of the State Board of Equalization did not lie and entered judgment in favor of the defendants and dismissed plaintiff's petition.

In our view the case of *Scudder v. County of Buffalo*, 170 Neb. 293, 102 N.W.2d 447 (1960), is dispositive of this case. That case was also a declaratory judgment action challenging an erroneous assessment of plaintiff's property. This court held that relief from the overassessment of property for tax purposes is by appeal to the District Court from the order of the county board of equalization fixing the assessed value of the property, and the remedy thus given is full, adequate, and exclusive. A collateral attack may be made upon an assessment of property for tax purposes only if the assessment or some part thereof is wholly void. A declaratory judgment action is not an appropriate remedy to attack an assessment of real property made by the county board of equalization. Those principles were reaffirmed in *Ryan v. Douglas County Board of Equalization*, 199 Neb. 291, 258 N.W.2d 626 (1977).

In the case now before us the record establishes that the assessment of plaintiff's property met all jurisdictional requirements of the statutes. The assessments of plaintiff's property were not wholly void and were not subject to collateral attack. Direct appeals are pending in the District Court.

The defendants' motion for summary judgment should have been granted and it was unnecessary to proceed further under the facts in this case. The judgment of the District Court in dismissing plaintiff's petition was correct and is affirmed.

AFFIRMED.

CYNTHIA SUE COLE, APPELLEE, V. LARRY D. COLE, APPELLANT.

304 N.W.2d 398

Filed April 10, 1981. No. 43571.

1. **Divorce: Alimony: Property Division.** There is no mathematical formula by which awards for alimony or division of property in an action for dissolution of marriage can be precisely determined. They are to be determined by the facts of each case and the court will consider all pertinent facts in reaching an award that is just and equitable.
2. **Divorce: Alimony.** This court, on appeal, is not precluded from modifying an alimony award made by the District Court where such award is patently unfair on the record. An award of alimony may be altered on appeal where the record reflects good cause.
3. **Divorce: Alimony: Property Division.** When dissolution of a marriage is decreed, the court may order payment of such alimony by one party to the other and division of property as may be reasonable, having regard for the circumstances of the parties.
4. **Divorce: Alimony.** It is the general rule in this state that allowances of alimony in the form of an annuity or requiring the husband to pay a fixed sum for an indefinite period of time are not favored.

Appeal from the District Court for Box Butte County: ROBERT R. MORAN, Judge. Affirmed as modified.

Van Steenberg, Brower, Chaloupka, Mullin & Holyoke for appellant.

Laurice M. Margheim of Bayer & Margheim for appellee.

Heard before KRIVOSHA, C.J., BOSLAUGH, MCCOWN, CLINTON, BRODKEY, WHITE, and HASTINGS, JJ.

BRODKEY, J.

Larry D. Cole (Larry), respondent and appellant herein, has appealed to this court from a decree entered by the District Court of Box Butte County, Nebraska, dissolving the marriage of the appellant and Cynthia Sue Cole (Cynthia), petitioner and appellee. The appellant assigns as error that the trial court's allowance of $1,000 per month in alimony to the petitioner is excessive, and that the court erred in awarding alimony for an indefinite period of time. We affirm as modified.

The record in this matter indicates that Larry and Cynthia were married on May 29, 1965, in Alliance, Nebraska. One child, Suzanne, was born July 7, 1966. The care and custody of Suzanne was placed in Cynthia, and is not an issue in this appeal. We are principally concerned with the question of whether the alimony award of the trial court was equitable.

The evidence adduced at the trial reveals that the parties separated in December of 1975, when the petitioner first filed for divorce. In December of 1976 Cynthia moved with her daughter from Alliance to Gering, Nebraska, where Cynthia became employed as a licensed practical nurse. In March of 1977, while a passenger on a motorcycle, Cynthia was seriously injured in a one-vehicle collision. Her injuries resulted in her paralysis from the chest down, with only partial use of her arms and hands remaining. After the accident, Larry and Cynthia attempted a reconciliation; and with the proceeds recovered from a personal injury settlement received by the petitioner arising out of the motorcycle accident built a house which was "wheelchair accessible" and was otherwise designed to accommodate Cynthia's disabilities. After a period of 2 months, the reconciliation proved unsuccessful, and Larry moved out of the house. On August 22, 1979, Cynthia again filed a petition seeking the dissolution of her marriage to the appellant. This matter came to trial on April 22, 1980. In its decree

dated May 30, 1980, and filed on June 27, 1980, the court ordered in pertinent part:

"(a) That the marriage of Cynthia Sue Cole and Larry C. [sic] Cole is hereby dissolved.

"(b) That Cynthia shall have the custody of Suzanne, subject to reasonable rights of visitation by Larry.

"(c) On June 2 and June 16, 1980, and on the 2nd and 16th days of each month thereafter until Suzanne dies, marries, obtains the age of 19, becomes self-supporting or until further order of the Court, Larry shall make child support payments of $75.00 for a total of $150.00 each month. Larry may claim Suzanne as a dependent for income tax purposes.

"(d) On June 2 and June 16, 1980, and on the 2nd and 16th day of each month thereafter until further order of the Court, Larry shall make alimony payments of $500.00 for a total of $1,000.00 each month, subject to modification upon a showing of changed circumstances." The court divided the property of the parties, awarding Cynthia approximately 48 percent of the marital property and the appellant approximately 52 percent. Appellant makes no complaint with reference to the property division, but contends the alimony award is excessive.

The scope of review of a dissolution action in this court is well established, as follows: "'While in a divorce action the case is to be tried de novo, this court will give weight to the fact that the trial court observed the witnesses and their manner of testifying and accepted one version of the facts rather than the opposite.'" *Witcig v. Witcig*, 206 Neb. 307, 311, 292 N.W.2d 788, 791 (1980); *Boroff v. Boroff*, 204 Neb. 217, 281 N.W.2d 760 (1979); *Grummert v. Grummert*, 195 Neb. 148, 237 N.W.2d 126 (1975). The rules for determining alimony or division of property in an action for dissolution of marriage provide no mathematical formula by which such awards can be precisely determined. They are to be determined by the facts of each case and the court will consider all pertinent facts in reaching an award that is

just and equitable. *Grady v. Grady*, 204 Neb. 595, 284 N.W.2d 402 (1979); *Ragains v. Ragains*, 204 Neb. 50, 281 N.W.2d 516 (1979); *Blome v. Blome*, 201 Neb. 687, 271 N.W.2d 466 (1978). It is the general rule that a judgment of the District Court is supported by a presumption of correctness, and this court is not inclined to disturb the alimony award made by the trial court unless it is patently unfair on the record. See, *Buker v. Buker*, 205 Neb. 571, 288 N.W.2d 732 (1980); *Rinderknecht v. Rinderknecht*, 204 Neb. 648, 284 N.W.2d 569 (1979). However, we have also held that an award of alimony may be altered on appeal where the record reflects good cause. *Hermance v. Hermance*, 194 Neb. 720, 235 N.W.2d 231 (1975).

Guidelines for determining the reasonableness of alimony following a decree of dissolution of marriage are set out in Neb. Rev. Stat. § 42-365 (Reissue 1978), which provides as follows: "When dissolution of a marriage is decreed, the court may order payment of such alimony by one party to the other and division of property as may be reasonable, having regard for the circumstances of the parties, duration of the marriage, a history of the contributions to the marriage by each party, including contributions to the care and education of the children, and interruption of personal careers or educational opportunities, and the ability of the supported party to engage in gainful employment without interfering with the interests of any minor children in the custody of such party. . . ."

A review of the record convinces us that the alimony award ordered by the trial court was, under the circumstances of this case, unreasonably harsh and burdensome, and beyond his ability to pay, notwithstanding the unfortunate circumstances in which the appellee finds herself as a result of her accident. The record reveals that the appellant is a locomotive engineer for Burlington Northern railroad and has 10 years of experience and seniority. At the time of trial he was 39 years of age, in good health, and had an annual

income of approximately $37,000. The house and property awarded him by the court in its decree are unencumbered and debt free. Although the age of the appellant is set forth in the record, a careful search reveals that there is no evidence whatsoever as to the age of the appellee, or her life expectancy, although appellant states in his brief that she was 33 years of age at the time of the trial. Her present educational background is limited to a high school education, although, at trial, she indicated a desire to further her education and estimated that in view of her physical condition it would probably take her at least 6 years to complete college, rather than the normal 4-year period. The appellee has had surgery to improve the functioning of her right hand, and the record indicates she can now write with it. She desires to undergo further surgery to improve the functioning of her left hand. The court awarded her the home which she built with the proceeds of her insurance settlement in the amount of $15,000, which was used as a downpayment. There is a mortgage on the home in the amount of $37,858, on which she is obligated to make the payments. She shares this home with her daughter. Because of her condition, she is unable to dress and bathe herself, and depends upon home nursing care to aid her with her bladder and bowel problems.

Cynthia stipulated that she currently receives $235 per month for herself and $122 per month for her child, Suzanne, from Social Security. She further testified that her monthly expenses total approximately $900 per month. However, it appears from the record that this figure probably was inaccurate and did not include all of her monthly expenses; and the trial court expressed an opinion that she had underestimated her living expenses. Under the decree entered by the court, she was awarded an additional $1,000 per month as alimony and $150 per month as child support for Suzanne.

It further appears from the record that Larry's take-

home pay averages $2,137.63 per month; that his minimum monthly expenses are $923.15; and that when his monthly support obligation is added to his monthly expenses, his total monthly outlay is $2,073.15, which leaves him $64.48. Appellant argues that in view of his age and life expectancy as set forth in the Commissioners 1958 Standard Ordinary Mortality Table, if there is no change in the alimony award in this case, he will be required to pay a total of $462,000 to the appellee in alimony. It seems clear, however, that this conclusion is based on the assumption that Cynthia will live as long as he does. However, as previously stated, there is no evidence in the record with regard to Cynthia's age, or her life expectancy, and in view of her poor physical condition as the result of her accident, there may be serious doubts as to whether she could anticipate the life expectancy of a normal woman of her age. It would seem almost impossible at this time to accurately predict what the financial needs of Cynthia in the future will be, although the rule is clear that the amount of an alimony award should be based upon the evidence of conditions and circumstances existing at the time of the trial. The trial court in this case specifically provided that in the event of a future change of circumstances, its alimony award could be modified.

This brings us to appellant's second assignment, that the District Court erred in allowing alimony payable over an indefinite period of time. We have frequently reiterated the general rule in this state that allowance of alimony in the form of an annuity or requiring the husband to pay a fixed sum for an indefinite period of time is not favored, although we have on occasion upheld such awards where we deem them necessary or desirable. *Witcig v. Witcig*, 206 Neb. 307, 292 N.W.2d 788 (1980); *Magruder v. Magruder*, 190 Neb. 573, 209 N.W.2d 585 (1973); *Dunlap v. Dunlap*, 145 Neb. 735, 18 N.W.2d 51 (1945). We believe that in this case we should abide by the rule as announced

in the foregoing cases, particularly in view of the fact that in the event conditions change the award can always be modified by the court upon proper application and showing of such change of circumstances. Our conclusion is that the appellant in this case should be given relief from the rather high award of monthly alimony specified by the trial judge so that he may, to a limited degree at least, improve his financial condition. We therefore determine that the award by the trial court in its decree of $1,000 per month alimony for Cynthia should be modified so as to require the payment by Larry to Cynthia of alimony in the amount of $800 per month, in addition to the amount he is required to pay for child support, such monthly alimony to continue for a period of 25 years from the date of the original decree, with the proviso, however, that such alimony shall terminate in the event of her death or remarriage before that time.

Appellee has requested that we award her an attorney fee for the services of her attorney in this court. In view of the circumstances in this case, we award her an attorney fee of $500 for that purpose.

No other errors having been assigned or discussed in this case, we affirm the decree entered by the trial court, as modified.

AFFIRMED AS MODIFIED.

STATE OF NEBRASKA, APPELLEE, V. STEVEN ROY HARPER, APPELLANT.

304 N.W.2d 663

Filed April 17, 1981. No. 43070.

1. **Death Penalty: Constitutional Law.** The Nebraska death penalty statutes, Neb. Rev. Stat. §§ 29-2519 to 29-2546 (Reissue 1979), do not violate the provisions of the U.S. or Nebraska Constitutions.
2. **Death Penalty: Words and Phrases.** In the context of Neb. Rev. Stat. Ch. 29, art. 25 (Reissue 1979), the word "sentence" in § 29-2521.03 is

construed to mean a sentence of death, and the provisions of that section directing the determination by the Supreme Court of the propriety of a "sentence" by comparison with previous cases are applicable only in a case where a sentence of death has been imposed.

3. **Death Penalty.** Where a death sentence has been imposed and the Supreme Court is required to determine the propriety of that sentence in such case, the determination of which previous first degree murder cases involve the same or similar circumstances and are therefore comparable will be made by this court on a case-by-case basis.
4. **Criminal Law: Evidence.** Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

Appeal from the District Court for Douglas County: JAMES M. MURPHY, Judge. Affirmed.

Thomas M. Kenney, Douglas County Public Defender, and Stanley A. Krieger for appellant.

Paul L. Douglas, Attorney General, and J. Kirk Brown for appellee.

Heard before KRIVOSHA, C.J., BOSLAUGH, MCCOWN, CLINTON, BRODKEY, WHITE, and HASTINGS, JJ.

MCCOWN, J.

The defendant was found guilty on two counts of first degree murder and three counts of poisoning with intent to kill, wound, or maim. After hearings on the constitutionality of the death penalty and the existence of aggravating and mitigating circumstances, a sentence of death was imposed on each of the first degree murder counts and consecutive sentences of 10 years each were imposed on the poisoning counts.

In 1973-74 the defendant, Steven R. Harper, was involved in an emotional relationship with Sandra Johnson, a woman whom he had known since high school. In late 1974 the relationship deteriorated and Sandra told the defendant she intended to marry Duane Johnson. Sandra and Duane Johnson were

married January 17, 1975. A few days later defendant attempted to persuade Sandra to annul her marriage, and when she refused defendant threatened to kill both Sandra and Duane.

On June 21, 1975, Sandra and Duane Johnson and several other members of their family were outdoors at the residence of Sandra's mother, Jean Betten. The defendant drove up to the residence and, after some argument, fired a shotgun at the group and Sandra's mother and brother were struck by shotgun pellets. As a result of the shooting incident the defendant was arrested, charged, and convicted of shooting with intent to kill, wound, or maim. He was sentenced to imprisonment in the penal complex. On November 16, 1977, defendant was paroled, and returned to Omaha.

On March 3, 1978, defendant commenced work at the Eppley Research Institute in Omaha, Nebraska. His job was to take care of the animals which the institute was using in connection with cancer research. While he was employed there the defendant had access to various carcinogenic drugs.

While working at Eppley the defendant lived in his parents' home in Omaha. On August 7, 1978, the Harper family took a dog to the veterinarian clinic and a cat on the next day. Both animals were suffering from symptoms of some type of poisoning which the veterinarian stated he had never seen before. Both animals were treated without success and both died within a few days. Shortly thereafter, on August 18, 1978, the defendant resigned his position at the Eppley Research Institute.

On Saturday, September 9, 1978, Sandra and Duane Johnson were living in a residence on Fontenelle Boulevard in Omaha, Nebraska, with their two children, a son, Michael, who was 3 months old, and a daughter, Sherry, 2 years old. Sandra's sister, Susan Conley, also lived with the family. The Johnson family and Susan left the home around 8 p.m. on

Saturday, September 9, and the family returned home at about 1 a.m. on the morning of September 10. At about 6 a.m. Susan Conley went to the refrigerator and tasted the lemonade from a pitcher but it tasted strange so she spit it out. She then had a piece of pecan pie and poured herself a glass of milk. The milk also tasted odd so she spit it out, too, and dumped the rest of the milk in the sink. Later that morning Sandra and Duane and their daughter, Sherry, got up. Sandra prepared some cereal with milk for Sherry. Duane had a glass of milk and Sandra had nothing to eat or drink.

Immediately after eating her cereal Sherry complained of a stomach ache. Sandra thought nothing of it and she and Sherry went to a shopping center. Sherry suddenly began to vomit and Sandra and Sherry returned home. Meanwhile, Harold Betten, Sandra's father, and Elaine Betten, Sandra's stepmother, had stopped at the Johnson home for a visit. The Bettens had coffee and Harold Betten saw Duane Johnson drink two glasses of some sort of liquid from the refrigerator. Neither of the Bettens had any milk or lemonade. The Bettens were leaving as Sandra and Sherry returned home. Shortly thereafter, Duane became sick and began vomiting, and by noon both Duane and Sherry were quite ill and both were in bed.

About 2 p.m. Sandra's sister, Sallie Shelton, her husband, Bruce Shelton, and their 11-month-old son, Chad, stopped at the Johnson home for a visit. They stayed approximately an hour and they split a glass of lemonade between them. Neither Sandra nor her 3-month-old son, Michael, drank milk or lemonade that day. By evening Duane Johnson, Sherry Johnson, Bruce Shelton, Sallie Shelton, and Chad Shelton were all very ill. Chad Shelton was taken to the hospital on Tuesday, September 12, and died on Thursday, September 14, 1978. His doctors thought the problem might be Reye's syndrome. Duane Johnson was taken to one doctor on September 13 and to

another doctor the next day, at which time he could not walk and was incoherent. He was taken to the hospital and died September 15, 1978.

At that point, with two persons dead and three others extremely ill, the Johnson household was investigated by medical authorities for toxic substances, without any success. Autopsies were performed on the bodies and on Monday, September 18, 1978, a meeting of some 20 doctors and public health officials was held to discuss the situation. They determined that on September 10, 1978, 10 people had been in the Johnson household and 5 of them, within 8 days, were either dead or ill while the other 5 were apparently healthy. Of the 5 people who were affected, all of them drank either milk or lemonade while at the Johnson household. Of the 5 who were not affected, none of them had consumed any milk or lemonade at the Johnsons on that day. At this point the matter was brought to the attention of the Omaha police.

The police began a homicide investigation. They discovered, among other things, the 1975 shooting incident and they received a report from the Center for Disease Control in Atlanta, Georgia, which indicated that whatever the substance was which had killed Chad Shelton and Duane Johnson, it was of a toxic nature and might well have been some type of carcinogenic drug. The report suggested checking with the Eppley Research Institute. The director, after having the situation explained to him, suggested the substance dimethylnitrosamine as the possible toxic agent. Dimethylnitrosamine is a carcinogen used to induce cancer in the liver.

With the evidence which the police had by that time, they obtained a warrant to search the defendant's home on October 3, 1978. The search revealed several empty animal cages of the type used at Eppley and two empty vials of the kind used at Eppley. Tests revealed that one vial had contained a mixture of a salt of arsenic and dimethylbenzanthracene, and the

other vial contained dimethylaminobenzaldehyde. One was a carcinogen which was stored, along with dimethylnitrosamine, in a locked refrigerator on the sixth floor of the Eppley Research Institute in an area where the defendant had worked. The key was in a receptacle next to the refrigerator.

In a long series of tests and detailed studies and by the testimony of medical forensic experts, the toxic substance which killed Chad Shelton and Duane Johnson and poisoned the other three individuals was identified as dimethylnitrosamine, a carcinogen. Dimethylnitrosamine is an extremely toxic liquid, comparatively tasteless and lethal in small quantities, which attacks the liver and disrupts the blood clotting mechanism.

Following the search of the defendant's home a warrant for his arrest was issued. On October 13, 1978, the defendant was arrested in Beaumont, Texas, and later returned to Nebraska for trial.

At the trial William Trout, a former inmate at the penal complex who became acquainted with the defendant during the defendant's imprisonment for the 1975 shooting incident, testified as a witness for the State. Trout testified that while he and the defendant were together at the penal complex the defendant told Trout that he had tried to kill his girl friend and that if he could not have her no one could.

Trout was sent to Omaha, Nebraska, on work release detail about May 1, 1978, and at that time renewed his friendship with the defendant, who had been previously paroled in November 1977. Trout saw and visited with the defendant five or six times during the summer of 1978 and also talked to the defendant on the telephone from time to time.

Trout testified that in early June 1978 in one of their conversations the defendant told Trout that in his job he had access to some very lethal drugs which would be extremely effective for use in murder. The

defendant indicated to Trout that he wanted to use the drugs to kill his former girl friend. In another conversation the defendant also told Trout that he had subjected his family cat and dog to the drugs and both had died. Trout also testified that in the last conversation that he had with the defendant while in Omaha, which occurred on Labor Day weekend 1978, the defendant said he was going to enter his girl friend's house and poison the food. The defendant told Trout that he would put the substance in something in the refrigerator which would disguise the taste of the drug.

Trout was placed on final parole September 13, 1978, and went to California on the same day. Trout testified that on October 3, 1978, he received a telephone call from the defendant from Beaumont, Texas, in which the defendant told Trout that he was about to be arrested. When Trout asked why, the defendant told him that he had gone to his former girl friend's house and put the substance in the food and that there were deaths in the family and defendant had left Omaha because he was under suspicion.

Trout did not offer any information to the police, although he knew of the crime by reading the Omaha newspaper. Trout testified under a promise that no charges would be filed against him. The defendant did not testify at the trial. One witness testified for the defense that she was with the defendant in a bar from approximately 7 p.m. September 9, 1978, until 2 a.m. September 10, 1978.

The jury found the defendant guilty on all counts. A sentence of death was imposed on each of the first degree murder counts and consecutive sentences of 10 years' imprisonment on each of the poisoning counts, and this appeal followed.

The major portions of the defendant's arguments on appeal are directed at the constitutionality of the death penalty and the constitutionality of the statutes of Nebraska dealing with its imposition. Virtually

all of the defendant's challenges have been dealt with previously by this court, including the issues of aggravating and mitigating circumstances set out in Neb. Rev. Stat. § 29-2523 (Reissue 1979). We see no point in reviewing these principles again. See, *State v. Simants*, 197 Neb. 549, 250 N.W.2d 881 (1977); *State v. Rust*, 197 Neb. 528, 250 N.W.2d 867 (1977); *State v. Stewart*, 197 Neb. 497, 250 N.W.2d 849 (1977); *State v. Otey*, 205 Neb. 90, 287 N.W.2d 36 (1979); *State v. Anderson and Hochstein*, 207 Neb. 51, 296 N.W.2d 440 (1980).

The defendant contends that the case of *Godfrey v. Georgia*, 446 U.S. 420, 100 S. Ct. 1759, 64 L. Ed. 2d 398 (1980), raises additional issues as to whether the defendant's conduct in the present case was especially heinous, atrocious, and cruel, or manifested exceptional depravity. In *Godfrey* the victims died instantly when shot and no other assault or infliction of physical pain preceded the death of either victim. The single aggravating circumstance found by the Georgia court to be present was that the killing was "outrageously or wantonly vile, horrible, and inhuman." In applying the facts of the case to the aggravating circumstances finding under rules previously set down by the Georgia court, the Supreme Court of the United States found no way to distinguish the *Godfrey* case in which the death penalty was imposed from the many cases in which it was not. We believe there is little or no relationship between *Godfrey* and the case at bar.

In the case now before us the sentencing court found four specific statutory aggravating circumstances present and no mitigating circumstances. The District Court found: (1) The defendant had previously been convicted of another crime involving the use of violence to the person; (2) The murders were especially heinous, atrocious, and cruel, and manifested exceptional depravity by ordinary standards of morality and intelligence. In that respect the court found that

the murders of Duane Johnson and Chad Shelton were both "conscienceless" and "pitiless" and were "unnecessarily torturous to the victim." After detailing the physical facts, the court found that each of the victims had died a slow and agonizing death, and that the imposition of extreme suffering on each of them resulted from the defendant's acts. The trial court also found that the murders were so coldly calculated as to indicate a state of mind totally and senselessly bereft of regard for human life; (3) At the time the murder was committed the defendant also committed another murder; and (4) The defendant knowingly created a great risk of death to at least several persons. The sentencing court found no mitigating circumstances present, and we can find no error in the sentencing court's assessment of either the aggravating or the mitigating circumstances. *Godfrey* has no application to the case at bar.

The defendant also urges us to reconsider our interpretation of 1978 Neb. Laws, L.B. 711, codified as part of Neb. Rev. Stat. Ch. 29, art. 25 (Reissue 1979), as to which homicide cases will be reviewed, analyzed, and compared in a case where a sentence of death has been imposed. We decline to do so and we reaffirm our holdings in *State v. Williams*, 205 Neb. 56, 287 N.W.2d 18 (1979).

The obligation of this court to determine the propriety of a death sentence in each case and to determine which prior first degree murder cases involve the same or similar circumstances embodies the exercise of the constitutionally imposed duty of the judiciary to determine in each case whether the conviction was lawful and whether a death sentence was legally and constitutionally imposed. Under the Constitution, so long as the death penalty is authorized by law and its imposition is left, under law, to the discretion of the judiciary, the ultimate determination of whether the death penalty was legally and constitutionally imposed in any case must remain a matter for judicial

rather than legislative determination.

The defendant next contends that the trial court erred in ruling that certain statements of the defendant, taken in violation of *Miranda* requirements and inadmissible in the State's case-in-chief, could be used for impeachment of the defendant on rebuttal if a proper foundation were laid. The defendant asserts that except for the erroneous ruling of the trial court, the defendant would have testified at trial.

The statements involved were inculpatory, one of them having been made in Beaumont, Texas, on October 13, 1978, and one made in Omaha, Nebraska, on January 8, 1979. On both occasions the police knew that the defendant was represented by counsel and that counsel had directed that there was to be no interrogation. The statements were obtained after the defendant had repeatedly refused to make a statement without the presence of his attorney. In connection with at least one statement the police promised the defendant that any statement made would never be used against him. At the hearing on the motion to suppress the District Court quite properly suppressed both statements and they were not admitted at the trial.

The U.S. Supreme Court has held that a statement of a defendant taken in violation of *Miranda* and, therefore, inadmissible in the case-in-chief may be used for impeachment purposes to attack the credibility of defendant's trial testimony if its trustworthiness meets legal standards. *Harris v. New York*, 401 U.S. 222, 91 S. Ct. 643, 28 L. Ed. 2d 1 (1971); *Oregon v. Hass*, 420 U.S. 714, 95 S. Ct. 1215, 43 L. Ed. 2d 570 (1975). We see no reason to extend the rule in Nebraska beyond the constitutional requirements laid down by the Supreme Court of the United States in *Harris* and *Hass*. In the case at bar, however, the issue is not properly before us. The trial court's ruling as to the admissibility of the statements in rebuttal was prospective only and the statements

were never offered or admitted at trial for any purpose.

The defendant also contends that the court erred in failing to grant a mistrial because of improper comments by the prosecutor in closing argument. During the final summation to the jury the prosecutor said: "Another aspect of the thing is that whoever did this — It's — It's not a secret that these people are sick, and it's not a secret that people have died. All along, you know, the person that did it can do one thing. He can say 'Yeah, substance used was this, so I'm going to help . . . .'" At this point the defense objected and moved for a mistrial. The trial court denied the motion for mistrial and immediately instructed the jury to disregard the statement. At the conclusion of the trial, as a part of the comprehensive instructions, the jury was specifically instructed that they were to draw no conclusions or inferences from the fact that the defendant had not testified in the case and that they were entitled to draw no conclusions or inferences as to his reasons in that regard.

The defendant relies upon the holding in *Griffin v. California*, 380 U.S. 609, 85 S. Ct. 1229, 14 L. Ed. 2d 106 (1965), which forbids either comment by the prosecution on the accused's silence or instructions by the court that such silence is evidence of guilt. We do not condone comment by the prosecution on the silence of the accused, whether the comment is direct or indirect, but under the circumstances here, where the evidence of guilt was overwhelming and the trial court specifically struck the comment and instructed the jury to disregard the statement and later gave a correct and proper instruction on the failure to testify, we are constrained to find that the error, if any, was not prejudicial within the meaning of *Chapman v. California*, 386 U.S. 18, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967).

The defendant also contends that the trial court erred in admitting evidence of the 1975 shotgun

assault. Under Neb. Rev. Stat. § 27-404 (Reissue 1979), evidence of other crimes, wrongs, or acts may be admissible for purposes such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. In the case at bar the evidence of the 1975 crime was clearly admissible under the statute. See *State v. Hitt*, 207 Neb. 746, 301 N.W.2d 96 (1981).

The final issue in the case at bar is whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant. See Neb. Rev. Stat. § 29-2522 (Reissue 1979).

We have previously noted that the sentencing court found four statutory aggravating circumstances present and no mitigating circumstances. The defendant was a 25-year-old college graduate at the time these crimes were committed. His only prior criminal conviction was for the 1975 incident shown in the record here. The sentencing court meticulously considered each of the statutory aggravating and mitigating circumstances and made written findings of fact based upon the records of the trial as required by statute. Some of those findings have been previously set out. The sentencing court's finding that the murders of Duane Johnson and Chad Shelton were so coldly calculated as to indicate a state of mind totally and senselessly bereft of regard for human life appropriately summarizes the facts of this case.

Our review of first degree murder convictions finds no case which is factually comparable to the case at bar. Any objective weighing and balancing of aggravating and mitigating circumstances and comparison to the other death penalty cases now pending in this state establishes that the death sentence in the case now before us is not excessive or disproportionate to death penalties imposed in other death penalty cases under any measure of comparison.

The defendant's remaining assignments of error are without merit and the convictions and sentences are affirmed.

AFFIRMED.

KRIVOSHA, C.J., concurring in part, and in part dissenting.

I find that once again, I must in part concur with and in part dissent from the majority in its decision concerning the proper disposition of a case involving the commission of a first degree murder. See, *State v. Holtan*, 205 Neb. 314, 287 N.W.2d 671 (1980); *State v. Williams*, 205 Neb. 56, 287 N.W.2d 18 (1979); *State v. Otey*, 205 Neb. 90, 287 N.W.2d 36 (1979); *State v. Peery*, 205 Neb. 271, 287 N.W.2d 71 (1980); *State v. Rust*, *ante* p. 320, 303 N.W.2d 490 (1981).

I concur with the majority's finding that the judgment of conviction should be affirmed, and likewise concur with the majority's conclusion that the trial court did not err regarding the admitting into evidence of certain statements made by the appellant. I likewise concur in the majority's conclusion that the trial court did not err in refusing to declare a mistrial because of allegedly improper comments by the prosecutor in closing argument.

With regard to the matter of the admissibility of the evidence of the 1975 gunshot assault, I likewise concur with the majority that in the instant case the evidence of the 1975 gunshot assault was relevant to prove motive and, therefore, admissible under the provisions of Neb. Rev. Stat. § 27-404 (Reissue 1979). I do not, however, believe that we should leave the impression that merely because evidence may in some manner be relevant to any one of the various noted exceptions, though the prosecution does not know which one, such evidence of prior or subsequent crimes is always admissible. See dissent of Krivosha, C.J., in *State v. Ellis*, *ante* p. 379, 399, 303 N.W.2d 741, 753 (1981).

It is with regard to the imposition of the death penalty in this case that I must dissent. My disagreement with the majority is not because I do not believe the crime committed to be atrocious and deplorable. Quite to the contrary, I believe the crime to be flagrant and shocking. But emotions may never cancel the Constitution.

I remain firm in my view that the imposition of the death penalty is not, per se, cruel and unusual punishment in violation of the eighth amendment. *Proffitt v. Florida*, 428 U.S. 242, 96 S. Ct. 2960, 49 L. Ed. 2d 913 (1976). I likewise remain firm in my belief that the imposition of the death penalty is not immoral or unethical. See dissent in *State v. Williams, supra.*

Moreover, I am now convinced that there are indeed some instances, though extremely limited, when the imposition of the death penalty is constitutionally permissible. I believe that "killers for hire" may be executed as a consequence of their conviction. See *State v. Anderson and Hochstein*, 207 Neb. 51, 296 N.W.2d 440 (1980). There may be other limited categories which have not as yet been presented to the court for consideration. As to those, I shall reserve comment at this time.

However, I have now concluded that under the limitations imposed upon courts by both the federal and state Constitutions, the imposition of the death penalty as now applied in most other instances is arbitrary and capricious and not permitted.

As I noted in my dissent in *State v. Rust, supra*, even disregarding the provisions of 1978 Neb. Laws, L.B. 711, now Neb. Rev. Stat. §§ 29-2521.01 et seq. (Reissue 1979), the death penalty is generally in violation of one's constitutional rights prohibiting the imposition of the death penalty in an arbitrary and capricious manner.

In *State v. Rust, supra* at 327, 303 N.W.2d at 495, I observed: "A reading of the various opinions rendered in the case of *Furman v. Georgia*, 408 U.S. 238, 92

S. Ct. 2726, 33 L. Ed. 2d 346 (1972), makes it manifestly clear that the adoption of statutes such as Neb. Rev. Stat. § 29-2522 (Reissue 1979), and the provisions of L.B. 711, are simply a response to the United States Supreme Court's recognition that it is a violation of an individual's constitutional rights when the decision to execute is arrived at in an arbitrary and discriminatory manner. The fact that we may create criteria to aid us in imposing the death penalty does not overcome the constitutional prohibition if, after applying the formula, *we nevertheless continue to impose the penalty in an arbitrary and capricious manner.*" (Emphasis supplied.)

I believe that the language of the majority opinion in *Gregg v. Georgia*, 428 U.S. 153, 96 S. Ct. 2909, 49 L. Ed. 2d 859 (1976), though not reaching my present conclusion, does in fact support that conclusion. It reads in part as follows: "While *Furman* did not hold that the infliction of the death penalty *per se* violates the Constitution's ban on cruel and unusual punishments, it did recognize that the penalty of death is different in kind from any other punishment imposed under our system of criminal justice. Because of the uniqueness of the death penalty, *Furman* held that it could not be imposed under sentencing procedures that created a substantial risk that it would be inflicted in an arbitrary and capricious manner. . . . '[T]he Eighth and Fourteenth Amendments cannot tolerate the infliction of a sentence of death under legal systems that permit this unique penalty to be so wantonly and so freakishly imposed.' [Citation omitted.]

"Furman mandates that where discretion is afforded a sentencing body on a matter so grave as the determination of whether a human life should be taken or spared, that discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action." *Id.* at 188-89.

As I have noted, examining a host of cases decided

within this jurisdiction makes it clear to me that the imposition of the death penalty in most cases in this state is indeed arbitrary and capricious. See analysis of cases in dissent, *State v. Williams*, *supra*, and *State v. Rust*, *supra*.

Not only does an analysis of those cases referred to in *Williams* and *Rust* lead one to the inescapable conclusion that the imposition of the death penalty is arbitrary and capricious, but a further examination of those cases in which a charge of second degree murder is filed, rather than first degree murder, likewise makes it clear that by the time a case comes to this court for examination there have been a sufficient number of arbitrary decisions made so as to make impossible the imposition of the death penalty in anything other than an arbitrary and capricious manner. While I do not for a moment question the right of the prosecutor to elect the charge to be filed, nor do I for a moment urge any change in that process, I likewise cannot ignore its existence in attempting to rationally analyze whether the death penalty can be imposed in anything other than an arbitrary manner except in very rare instances. I am not unmindful of the fact that this argument has already been rejected by the majority in the *Gregg* case. Nevertheless, I believe that in this respect the majority in *Gregg* is totally in error.

One need only examine two of the cases released by this court this day to note how the matter of prosecutorial discretion of necessity results in the death penalty being arbitrarily imposed. In addition to this case where the penalty of death was imposed, we have this day also announced our decision in the case of *State v. Stranghoener*, *post* p. 598, 304 N.W.2d 679 (1981). In that case we have affirmed a sentence of 20 years given to Stranghoener for second degree murder. The facts of the case, however, indicate to me that the appellant was, indeed, guilty of first degree murder. The facts in the *Stranghoener* case

disclose that Stranghoener, together with several other individuals, carefully, cruelly, and viciously planned the execution of one Jim Goslee, a member of their "family," for no other reason except to test the loyalty of another member of the "family." Stranghoener, though originally charged with first degree murder, was permitted as a part of a plea bargain to plead to the lesser charge of second degree murder and was sentenced to prison for 20 years. While one does not question or quarrel with the right of either the prosecution or the trial court in *Stranghoener*, it is impossible to set this case alongside those cases in which the death penalty has been imposed and discern a rational distinction.

Moreover, the *Stranghoener* case is not an isolated instance. An examination of only a few cases decided since 1973 establishes clear examples of how the imposition of the death penalty in a particular case is mere happenstance. In the case of *State v. Wredt*, *ante* p. 184, 302 N.W.2d 701 (1981), the defendant was permitted to plead guilty to second degree murder of his father. The evidence discloses that the defendant was 16 years old at the time of the commission of the crime. On the evening of the murder the defendant took a .45-caliber revolver outside and waited for his father to come home, which he did shortly after 6 p.m. After the father got out of his truck and started walking toward the house, the defendant stepped out from the corner of the house, aimed and cocked the revolver, and fired one shot into his father's chest which killed him instantly.

In *State v. Rouse*, 206 Neb. 371, 293 N.W.2d 83 (1980), the defendant was permitted to plead guilty to second degree murder as a result of a plea bargain arrangement and was sentenced to a term of 16 to 20 years in the penal complex. Defendant had originally been charged with six felony counts, including one count of first degree murder, one count of felony murder, three counts of burglary, and one count of

escape. The killing was of a police officer apparently seeking to apprehend defendant in connection with the burglary.

In *State v. Thompson*, 199 Neb. 67, 255 N.W.2d 880 (1977), the defendant was permitted to plead guilty to a charge of second degree murder after the State amended the complaint originally charging the defendant with first degree murder. He was sentenced to life imprisonment. The defendant had attended a party at the home of his sister. During the evening an argument developed, a fight broke out, and several guests subdued the defendant by getting him down on the floor. The defendant worked until noon the following day, purchased a .22-caliber semiautomatic rifle and some ammunition, and then returned to his apartment. At about 8 p.m. his niece and sister came to see him. The defendant told them he was going to kill someone, whom he described. Later that evening the defendant walked into his sister's house, carrying the loaded rifle. There were a number of people in the house, including the victim. The defendant pointed the gun at a Mrs. Hicks and said he wanted to talk to her about what had happened the night before. He also pointed the rifle at several other persons in the room. A brief fight ensued, and after it was broken up the victim started to leave the room when the defendant shot him, striking him in the chest near his right shoulder, severing his trachea and several arteries. The victim died almost instantaneously.

In *State v. Laravie*, 192 Neb. 625, 223 N.W.2d 435 (1974), the defendant was charged with first degree murder and pled guilty to a reduced charge of second degree murder. He was sentenced to life imprisonment. The evidence discloses that the defendant broke into a residence in the early morning, picked up a knife from the kitchen table, then entered the bedroom of a 2-year-old child. When the 2-year-old cried out, the defendant stabbed him twice in the chest, causing his death.

In the case of *State v. Reyes*, 192 Neb. 153, 219 N.W.2d 238 (1974), the defendant was permitted to plead guilty to second degree murder pursuant to a plea bargain. He was sentenced to 20 years' imprisonment for the killing. The evidence discloses that the defendant approached the victim on a street corner where he had been standing with a 6-pack in each hand. The defendant shot the victim five times, killing him instantly.

The cases cited above are simply those which were appealed to this court and therefore found in the Nebraska Reports. We have no quick way of determining how many more cases of this nature can be found by examining the various District Court records. To be sure, the appealed and reported cases are not the only instances where this disparity occurs.

While I have already acknowledged that such variances and discretion are not within the control of the courts, and should not be within the control of the courts, I, nevertheless, cannot ignore the reality of those matters in attempting to determine whether the death penalty is imposed in a nonarbitrary and noncapricious manner in this state.

The words of Mr. Justice Stewart in *Furman v. Georgia*, 408 U.S. 238, 92 S. Ct. 2726, 33 L. Ed. 2d 346 (1972), seem most applicable to this analysis. At 309-10, he said: "These death sentences are cruel and unusual in the same way that being struck by lightning is cruel and unusual. For, of all the people convicted of rapes and murders in 1967 and 1968, many just as reprehensible as these, the petitioners are among a capriciously selected random handful upon whom the sentence of death has in fact been imposed. . . . I simply conclude that the Eighth and Fourteenth Amendments cannot tolerate the infliction of a sentence of death under legal systems that permit this unique penalty to be so wantonly and freakishly imposed." I likewise must conclude that the Constitution of the United States and the Constitution of the State of

Nebraska cannot tolerate the infliction of a sentence of death to be so wantonly and so freakishly imposed. Recognizing the system to be what it is, and further recognizing that the system must at least for the present remain as it is, I find no other alternative but to conclude that the Constitution of the United States and the Constitution of the State of Nebraska preclude the imposition of the death penalty except in but a few extremely isolated cases.

However, I wish not to be misunderstood by what I have said here. I do not believe that persons convicted of murder should be quickly forgiven and returned to society. Quite to the contrary, I believe that having acted like an animal in the commission of the crime, they should now be restrained as an animal during the balance of their lives. If it is indeed punishment we seek to impose, and I find no fault with that, then requiring them to live out the balance of their lives in a 9- x 6-foot cell, isolated from civilization and any of the benefits of freedom, would indeed be an appropriate punishment.

For me, the question is not whether the convicted should be punished but, rather, whether the form of punishment is permitted under the Constitution. Having now attempted for more than 2 years to glean any reasonable pattern in which one is either selected to be charged with first degree murder or selected to be executed, and being unable to do so, I must conclude our selection process is arbitrary and capricious and therefore invalid. The fact that we act arbitrarily in accordance with standards which we have established to aid us in making our decision, but which in fact repeatedly fail, does not cure the constitutional defects in the scheme.

Concluding, as we have, that all persons who have been ordered executed are treated alike does not address the issue. Discrimination is determined by examining the entire class and not just those who are discriminated against. The class is persons who

have unlawfully killed and not persons sentenced to death. That is what §§ 29-2521.01 et seq. seek to address.

I would sentence the appellant herein to be incarcerated in the penal complex for the balance of his natural life, and I would hope that the Board of Pardons would not commute the sentence so as to make him eligible to be released.

KARIN CONRAD, APPELLANT, V.
PHILLIP C. CONRAD, APPELLEE.

304 N.W.2d 674

Filed April 17, 1981. No. 43288.

1. **Child Support.** Accrued child support payments are not subject to modification.
2. ——. Remarriage of mother before decree of dissolution became final and her removal of child from the jurisdiction without consent of the court held not to estop mother from collecting accrued child support payments.

Appeal from the District Court for Douglas County: KEITH HOWARD, Judge. Reversed and remanded with directions.

Lawrence H. Yost of Yost, Schafersman, Yost, Lamme & Hillis for appellant.

Richard J. Spethman for appellee.

Heard before KRIVOSHA, C.J., BOSLAUGH, MCCOWN, CLINTON, BRODKEY, WHITE, and HASTINGS, JJ.

PER CURIAM.

This is an appeal in a contempt proceeding against the respondent, Phillip Conrad, for failure to pay child support. In response to an order to show cause the respondent filed an application for an order suspending all child support payments due after January

1963. The trial court found that the petitioner, Karin Conrad, was equitably estopped from collecting accrued child support and permanently enjoined the petitioner from attempting to collect all unpaid child support obligations. The petitioner has appealed.

The petitioner and respondent were married on April 13, 1960. A daughter, Debby Anne Conrad, was born November 17, 1960. The petition for dissolution was filed on September 27, 1961, and a decree of dissolution entered on August 3, 1962. The decree awarded custody of the minor child to petitioner and provided that respondent should pay child support in the amount of $10 per week until such time as the minor child reached 21 years of age, became married, or self-supporting. The respondent was granted reasonable visitation rights.

The record indicates that while the dissolution proceeding was pending, the respondent failed to make some of the payments for temporary child support. The respondent testified that he did not make the payments because he was experiencing difficulty in exercising his visitation rights. After the dissolution, the respondent regularly exercised his rights of visitation through December 1, 1962.

On or about September 15, 1962, after the dissolution, the respondent learned that the petitioner planned to remarry and take Debby Anne to Germany. Based on this information the respondent filed an application on September 19, 1962, for a temporary restraining order to prevent the removal of Debby Anne from the court's jurisdiction. On October 18, 1962, a restraining order was granted. The petitioner denied knowledge of this order or of any subsequent pleadings filed by respondent pertaining to support and visitation rights.

On December 9, 1962, the petitioner married Kent R. Warren, a serviceman stationed at Fort Leonard Wood, Missouri. This marriage took place during the 6-month period before the decree of dissolution had become final.

On January 8, 1963, the respondent filed an application for an order requiring the petitioner to show cause why he had been denied visitation rights since December 1, 1962. On January 8, 1963, the court ordered the petitioner to appear and show cause why the respondent had been denied visitation privileges. The record does not show whether this order was complied with. A second application for an order to show cause was made on February 6, 1963, in which the respondent prayed for an order requiring the petitioner to permit visitation or, in the alternative, to discontinue child support payments. The record does not show any disposition of this final application.

The respondent made support payments until January 15, 1963. The last time he saw his daughter was December 1, 1962.

The petitioner, her new husband, and Debby Anne lived in Germany from February 1963 until the first part of 1966. During this time Phillip was not aware of their exact location and did not correspond with his daughter.

In 1965 the petitioner and Debby Anne returned to Omaha for a wedding. The petitioner did not attempt to contact the respondent at that time. In 1966 Warren took a job with the Omaha Public Power District and the family moved to North Bend, Nebraska, where they were living at the time this action was commenced.

The petitioner made no attempt to contact the respondent during the 14 years she and Debby Anne resided in North Bend. Since 1962 the only contact Debby Anne has had in relation to the respondent was in 1974 when her mother showed her a picture of her natural father.

The respondent throughout this period has resided in Omaha, Nebraska, and has been employed by the Omaha Police Department. The respondent has also remarried and now has 3 children from his second marriage. He testified at trial that he would not recognize his daughter if she walked into the courtroom.

We have held in many cases that accrued child support payments are not subject to modification. In *Ferry v. Ferry*, 201 Neb. 595, 600, 271 N.W.2d 450, 453-54 (1978), we said: "Where a divorce decree provides for the payment of stipulated sums monthly for the support of a minor child or children, contingent only upon a subsequent order of the court, such payments become vested in the payee as they accrue. The courts are without authority to reduce the amounts of such accrued payments."

The proper remedy for the respondent in this action would have been to seek a modification of the decree on the basis of changed circumstances before the payments accrued. Apparently, no disposition was made of the application filed by the respondent on February 6, 1963.

In *Eliker v. Eliker*, 206 Neb. 764, 772-73, 295 N.W.2d 268, 273 (1980), the father had suspended payment of child support because of a denial of visitation rights. We held: "This jurisdiction is committed to the view that courts of this state are without authority to forgive accrued child support and that such payments continue to accrue in accordance with the court's previous order until paid in full or otherwise modified by the court. See, *Smith v. Smith*, 201 Neb. 21, 265 N.W.2d 855 (1978); *Ruehle v. Ruehle*, 169 Neb. 23, 97 N.W.2d 868 (1959). The fact that a mother in whose custody a minor child has been placed by the court refuses to permit a father ordered to pay child support to exercise his rights of visitation does not justify the father's withholding the payment of child support. The father is not without remedy and may make application to the court for further orders requiring the mother to permit the father to exercise his right of visitation. The right of visitation, however, is not a quid pro quo for the payment of child support and the mother's action does not justify the father's failure to pay. . . .

"The fact that Mrs. Eliker may have improperly

and without justification prevented Mr. Eliker from exercising visitation rights with his daughter, did not either entitle or justify Mr. Eliker's failing to continue making child support payments as required. Neither of the parties is authorized to interfere with the court's orders and only the court can determine what, if any, adjustments should be made."

The respondent seeks to invoke the doctrine of equitable estoppel as applied in *Smith v. Smith*, 201 Neb. 21, 265 N.W.2d 855 (1978), to avoid the payment of accrued child support. In the *Smith* case, however, there was a reliance in good faith upon statements or conduct of the party estopped and a change of position to the injury or detriment of the party claiming estoppel. Unlike the *Smith* case, there is in this case no evidence of detrimental reliance and a change of position on the part of respondent. Equitable estoppel is inapplicable to the present case.

The respondent's remedy was to obtain a modification of the decree at the time of the alleged change in circumstances. Having failed to obtain a modification, this court is now without jurisdiction to reduce the accrued support payments vested in the petitioner.

The judgment of the District Court is reversed and the cause remanded with directions to dismiss the application of the respondent.

REVERSED AND REMANDED WITH DIRECTIONS.

BOSLAUGH, J., dissenting in part.

I concur in that part of the opinion which holds that accrued payments of child support are not subject to modification. I dissent from the holding that the petitioner is not equitably estopped to enforce payment of the accrued amounts.

The majority opinion focuses upon the failure of the respondent to obtain a modification of the decree in accordance with his application filed on February 6, 1963. It ignores the inequitable conduct of the petitioner.

There can be little doubt but that the respondent was entitled to relief upon his application filed in 1963. The grounds for relief are admitted by the petitioner or shown in the record. In *Prell v. Prell*, 181 Neb. 504, 505, 149 N.W.2d 104, 105 (1967), we said: "We hold that where the decree of divorce gives visitation rights, the law contemplates that the children shall remain within the state so that the rights may be exercised. The mother's removal of the children from the state without the consent of the father or of the court may be sufficient change of circumstances to justify the court in suspending or reducing the amount of child support payments until the children have returned to the state."

This is not a case in which the father was indifferent to his visitation rights or the removal of his child from the jurisdiction. Upon his application, a restraining order to prevent the removal of the child from the jurisdiction was issued on October 18, 1962. This order was approved as to form by the petitioner's attorney of record.

The petitioner, in disregard of the limitations of the decree, remarried on December 9, 1962. Then, without the permission of the trial court, took the child to Germany, effectively depriving the respondent of his visitation rights for a period of 3 years.

At no time after January 1963 did the petitioner request or demand the support payments which were provided for in the decree. The reason is obvious. The petitioner knew that she would have to afford the defendant his right of visitation if she expected to receive support payments. Instead, she chose to raise the child completely separate and apart from the respondent so that the child would have no opportunity to know her natural father. Now, after the child has reached her majority, the petitioner demands payment of the accrued child support.

In *Smith v. Smith*, 201 Neb. 21, 265 N.W.2d 855 (1978), we held that a mother who had obtained a

relinquishment from the father was estopped to collect accrued child support after the date that the adoption could have been completed even though no adoption ever took place. We said: "This court does not have authority to reduce past-due installments of child support. This is not to say, however, that it may not find in a proper case that a party has equitably estopped herself from collecting installments accruing after some affirmative action which would ordinarily terminate future installments. The securing of the consent of the father to an adoption by another of his child is such action which by its nature should terminate further liability for child support." *Id.* at 28, 265 N.W.2d at 860. In *Williams v. Williams*, 206 Neb. 630, 294 N.W.2d 357 (1980), we again recognized that equitable estoppel may prevent the enforcement of accrued child support.

The doctrine of clean hands which bars redress to those guilty of improper conduct in the matter as to which they seek relief is also applicable in proceedings of this nature. In cases involving factual situations similar to this case, other courts have held that payment of accrued child support will not be enforced.

In *Smith v. Smith*, 282 Minn. 190, 193-95, 163 N.W.2d 852, 856-57 (1968), the court refused to enforce payment of accrued child support. The court said: "Here, the father violated the divorce decree by failing to make the monthly support payments expressly required by the decree. The mother, however, also impliedly violated the decree by surreptitiously removing the minor daughters to the United Arab Republic, thereby defeating the right to reasonable visitation reserved to the father and provoking his refusal to pay support.

"Applying the equitable doctrine of 'unclean hands,' it is clear that a party who has initially violated a divorce decree should not under ordinary circumstances be permitted to enforce the decree against

the other party even though the latter subsequently violates the decree. This rationale seems to be the underlying theoretical basis for the well-established and oft-cited Minnesota rule first promulgated in Eberhart v. Eberhart, 153 Minn. 66, 189 N.W. 592, that, absent unusual circumstances, where a mother by wrongful or malicious conduct deprives the father of visitation rights or where she removes the child to another state and does not inform the father of the removal or the whereabouts of the child, the father is relieved of the obligation to continue making support payments accruing thereafter.

"In Michalson v. Michalson, 263 Minn. 356, 357, 116 N.W.2d 545, 547, we clarified this rule by cautioning that it is 'not a hard-and-fast rule which must have strict application in each case' to which it may appear to apply. Rather, a revision of child support payments depends upon the particular facts of each case. We emphasize, as we did in Michalson, that the welfare of the child or children of the marriage is the paramount consideration, and that providing support is primarily the father's parental duty. Thus, unlike the situation in which a husband might rely upon the commonly accepted view of automatic abatement of payment of alimony upon remarriage of the wife, a father should not regard his obligation to pay support terminated where the mother wrongfully or maliciously deprives him of his visitation rights or otherwise defeats such rights by surreptitious removal of the children from the jurisdiction of the court. When such occurs, a proper concern by the father for the welfare of the children and regard for his duty to provide support makes it incumbent upon him, no less than upon the mother, to seek a modification of the decree to meet changed circumstances. While it may be argued that the mother, whose conduct created the problem, ought to be required to take the initiative and commence proceedings to justify her actions and her right to continued child support,

her failure to do so cannot excuse the father from continuing to pay support where a refusal to make payments detrimentally affects the welfare of the child. An unreasonable delay in seeking a revision of the decree, coupled with a failure to pay resulting in detriment to the child, can very easily be viewed as selfish and embittered conduct designed to punish the mother in disregard of the physical needs of the child. It should be noted that in at least two cases involving unusual circumstances we have upheld postdecree orders compelling payment of accrued support installments despite removal of the children from the state without consent of the father or leave of court.

"Unusual circumstances which alone or in combination with other facts may justify such an unconsented-to removal are: (1) The father's failure to make support payments prior to the removal; (2) the necessity of quick action by the mother to accept an attractive job opportunity in another state; and (3) the father's indifference to his visitation rights or to the removal of his children upon the transfer of the mother's new husband to a military post outside the United States.

"The record in this case reveals no such circumstances."

In *Stratton v. Stratton*, 67 S.D. 354, 358, 293 N.W. 183, 184-85 (1940), the court held the inequitable conduct of the wife in depriving the husband of his rights of visitation prevented her from enforcing payment of accrued alimony. The court said: "It is the contention of the appellant that the provision in the decree of divorce requiring respondent to pay alimony being unconditional in its terms, appellant is entitled to such payments notwithstanding the fact that she has never performed any of the obligations imposed upon her by said decree. In other words, having openly defied the court for more than ten years, and until the passage of time has rendered the performance of the obligations imposed upon her, to-wit:

to permit the respondent to enjoy the society of his little girl for occasional brief intervals—impossible, she now insists that respondent be compelled to perform the obligations imposed upon him, and that he be imprisoned until such obligations are performed. Appellant's conception of the duty and function of a court of equity is entirely wrong. A court of equity delights in doing equity, but nothing could be more inequitable than what appellant is asking the court to do in this case. The agreement of the parties was that respondent was to pay appellant certain sums of money as alimony and in consideration therefor appellant was to permit respondent to occasionally enjoy the society of his little child. This she steadfastly refused to do and for no reason in the world except pure malice.

"Appellant is not in court with clean hands and the court will leave her where it finds her. The Supreme Court of Minnesota recently reached the same result in a similar case. Anderson v. Anderson, Minn., 291 N.W. 508." See, also, *Pronesti v. Pronesti*, 368 Mich. 453, 118 N.W.2d 254 (1962); *Heidemann v. Heidemann*, 96 Idaho 602, 533 P.2d 96 (1974); *Pence v. Pence*, 223 Ark. 782, 268 S.W.2d 609 (1954); *Noble v. Noble*, 86 Nev. 459, 470 P.2d 430 (1970); *Levell v. Levell*, 183 Or. 39, 190 P.2d 527 (1948).

A number of courts have held that the controlling question in such cases is the best interests or welfare of the child. Where there is no prejudice to the child and public funds are not involved, payment of accrued child support will not be enforced where it would be inequitable between the parties to do so.

This principle was recognized in *McGee v. McGee*, 190 Neb. 415, 417, 209 N.W.2d 339, 340 (1973), where we said: "It must be emphasized that this rather extraordinary relief should not, and will not, be granted in every case seeking termination of child support. It is only in those rare cases like the instant one where the mother has removed the children from

the state and the jurisdiction of the court and has deprived the father of all visitation rights that suspension of child support payments should be granted. We do not in any way intimate that a dispute between parents as to visitation rights may be used by a father as a threat collaterally to relieve himself from his duty and obligation to support his children. But the removal of the children from the jurisdiction of the court without consent, together with the deprivation of all visitation rights and no suggestion or showing, after notice, that the children are in need or not properly taken care of warrants a court to invoke a suspension of the payments to preserve its jurisdiction in the matter. The remedy of suspension is the only one that can be used to meet an intentional violation of the law and destroy the jurisdiction of the court."

There is another basis upon which the respondent can obtain relief in this case. In *Goodman v. Goodman*, 173 Neb. 330, 113 N.W.2d 202 (1962), we held that child support payments which accrue after a petition to modify the judgment has been filed may be canceled. In *McGee v. McGee, supra*, a case involving a somewhat similar factual situation, we suspended child support payments retroactively to the date the children had been removed from the state by the mother.

McCOWN, J., joins in this dissent.

STATE OF NEBRASKA, APPELLEE, V.
DAVID STRANGHOENER, APPELLANT.

304 N.W.2d 679

Filed April 17, 1981. No. 43556.

1. **Presentence Reports.** Any presentence report or psychiatric examination shall be privileged and shall not be disclosed directly or indirectly to anyone other than a judge, probation officers to whom an offender's file is duly transferred, or others entitled by law to receive such informa-

tion. The court may permit inspection of the report or examination of parts thereof by the offender or his attorney, or other persons having a proper interest therein, whenever the court finds it is in the best interest of a particular offender. The court may allow fair opportunity for an offender to provide additional information for the court's consideration. Neb. Rev. Stat. § 29-2261(5) (Reissue 1979).

2. **Criminal Law: Sentences.** A sentencing judge has broad discretion as to the source and type of evidence or information which may be used as assistance in determining the kind and extent of the punishment to be imposed, and the judge may consider probation officer reports, police reports, affidavits, and other information, including his own personal observations.
3. ____:____ A sentencing judge is not bound by the recommendations of the probation officer in determining the sentence to be imposed.
4. ____:____ Among the factors meriting consideration when sentence is imposed are the family ties, age, mentality, education, experience, and social and cultural background of the convicted criminal; his willingness to work at honest labor; his past criminal record or law-abiding conduct; the motivation for the offense, the nature of the offense, and the amount of violence, if any, involved in the commission of the offense.
5. **Homicide: Sentences.** Upon conviction for second degree murder, the court is not authorized to pronounce an indeterminate sentence, but may impose a sentence of a definite term of years, not less than the minimum authorized by law; or, in the alternative, may impose a sentence of life imprisonment.

Appeal from the District Court for Sarpy County: RONALD E. REAGAN, Judge. Affirmed.

Michael N. Schirber for appellant.

Paul L. Douglas, Attorney General, and Marilyn B. Hutchinson for appellee.

Heard before KRIVOSHA, C.J., BOSLAUGH, MCCOWN, CLINTON, BRODKEY, WHITE, and HASTINGS, JJ.

BRODKEY, J.

David Stranghoener, the defendant and appellant herein, appeals to this court from his sentence by the District Court of Sarpy County, Nebraska, to a term of 20 years' imprisonment, stemming from his conviction in that court of second degree murder. We affirm.

By way of factual background, as reflected in the

preliminary hearing and the deposition of Charles McGee, received in evidence in this case, Stranghoener resided with his wife, Polly Stranghoener, in a house located in LaVista, Nebraska. Also residing at the Stranghoener house were Charles McGee, Dennis Paulson, and Laureen Leander, codefendants in the cause below. It appears that these individuals comprised a social "family," with Dennis Paulson as head of the family. One additional member of this family was the victim, Jim Goslee. However, it appears that by June 4, 1979, Paulson, McGee, and the defendant had met and determined that Goslee was to be "eliminated" from the family.

On June 5, 1979, the parties met at the Stranghoener house for a party, which was attended by two additional codefendants in this matter, Darrell Thomas and Michael Meegan. At this party, the codefendants were made aware of the fact that Goslee would be killed that evening. The record indicates that alcohol and various drugs were being consumed by the family members, and that on at least one occasion the victim was given whiskey which had been drugged. At some time during the evening, several of the codefendants proceeded to a basement recreation room with the victim, while Michael Meegan, Charles McGee, and the defendant loaded a rifle in an upstairs bedroom. Before they returned to the basement, Meegan and McGee went outside the house and decided that McGee would shoot Goslee. It was determined Meegan would hand the rifle owned and provided by Stranghoener to McGee upon hearing the code word "execute." McGee returned to the basement, turned up a stereo, and gave the code word. Meegan stepped down into the basement and handed the rifle to McGee, who in turn shot Goslee. McGee later testified at the preliminary hearing that the rifle was an automatic weapon, and he fired the weapon until the gun was empty.

After the shooting had taken place, the victim's

body and clothes were searched, and his social security card, comb, and a note pad were destroyed. At 10 p.m., the body was wrapped up in a sheet and a quilt blanket which was taken from one of the defendant's couches. McGee, Meegan, Thomas, and Paulson wrapped the body and placed it into the trunk of a car; and then, in company with the defendant, McGee, Meegan, and Thomas drove over to Iowa, where the body was thrown into a creek bed. The body was subsequently discovered on June 18, 1979.

The defendant was originally charged with first degree murder in an information filed on June 25, 1979. This charge was subsequently amended to second degree murder pursuant to a plea bargain entered between the defendant and the State. The defendant pled guilty to the amended charge before the trial court on January 14, 1980.

On June 3, 1980, a sentencing proceeding was held before the trial court, at which time the court made both the defendant's presentence report and the presentence reports of each of his codefendants a part of the record. When the defendant was asked if he knew of any reason why the court should not then impose sentence, he responded: "No." However, counsel for the defendant asked to be "made aware" of any recommendations which the court had received from the probation officer. To this request, the court responded: "I have no information other than what is contained in the presentence investigation. Any recommendation as to whether there was incarceration or probation by Mr. Hartzell [the probation officer] was done solely as my agent, and you will not interview or cross-examine Mr. Hartzell, nor will I make it available to you any more than I would take the witness stand and let you know my particular deliberations that have gone into or made up a sentence that I impose. . . . If there are other factual matters that he put in the presentence investigation that you feel should be contradicted in some manner, or that he was

in error in placing them in, certainly you have the opportunity to rebut anything that's contained in the presentence investigation. . . . You're simply not going to question him or elicit information from him concerning private conversations or communications he's had as my particular agent any more than you would a law clerk." The defendant was subsequently sentenced to a term of 20 years' imprisonment at the Nebraska Penal and Correctional Complex, with credit granted for 1 year spent in the county jail while awaiting the disposition of this case.

Stranghoener has appealed to this court, alleging five errors on the part of the trial court. However, in his brief on appeal, only two of the assigned errors are discussed. It is elementary that consideration of a cause on appeal to this court is limited to errors assigned and discussed. *McClellan v. Dobberstein*, 189 Neb. 669, 204 N.W.2d 559 (1973); Neb. Ct. R. 8.a.2.(3). The defendant contends that the trial court erred: (1) By denying defendant's counsel an opportunity to inspect the presentence report and refusing to divulge any recommendation made by the probation officer; and (2) By imposing an excessive sentence.

At the outset we note that Neb. Rev. Stat. § 29-2261 (Reissue 1979) sets out the right of a criminal defendant or his attorney to investigate the contents of a presentence report. The pertinent subsections of the statute state:

"(1) Unless it is impractical to do so, when an offender had been convicted of a felony, the court shall not impose sentence without first ordering a presentence investigation of the offender and according due consideration to a written report of such investigation.

. . . .

"(5) Any presentence report or psychiatric examination shall be privileged and shall not be disclosed directly or indirectly to anyone other than a judge, probation officers to whom an offender's file is duly

transferred, or others entitled by law to receive such information. The court *may* permit inspection of the report or examination of parts thereof by the offender or his attorney, or other person having a proper interest therein, whenever the court finds it is in the best interest of a particular offender. The court may allow fair opportunity for an offender to provide additional information for the court's consideration." (Emphasis supplied.)

The law is well established in this state that in considering a proper sentence, the trial court is not limited in its discretion to any mathematically applied set of factors. It is necessarily a subjective judgment and includes the observations of the sentencing judge as to the demeanor, attitude, and all facts and circumstances surrounding the life of the defendant. "A sentencing judge has broad discretion as to the source and type of evidence or information which may be used as assistance in determining the kind and extent of the punishment to be imposed and the judge may consider *probation officer reports*, police reports, affidavits, and other information, including his own personal observations." (Emphasis supplied.) *State v. Kramer*, 203 Neb. 658, 660-61, 279 N.W.2d 634, 636 (1979); *State v. Miller*, 199 Neb. 19, 255 N.W.2d 860 (1977); *State v. Hylton*, 175 Neb. 828, 124 N.W.2d 230 (1963). Other than in recidivist cases, the presentence investigation is not involved with the issue of guilt of the defendant. The latitude allowed a sentencing judge in determining the nature and length of punishment is almost without limitation as long as it is relevant to the issue. *State v. Rose*, 183 Neb. 809, 164 N.W.2d 646 (1969). Moreover, this court has specifically held that the sentencing judge is not bound by the recommendations of the probation officer in determining the sentence to be imposed. *State v. Steed*, 201 Neb. 120, 266 N.W.2d 240 (1978).

In his brief on appeal, the defendant cites *State v. Richter*, 191 Neb. 34, 214 N.W.2d 16 (1973), for the

proposition that his attorney must be allowed to review a recommendation communicated between the probation officer and the sentencing judge. We do not agree. In *Richter*, we held only that it was harmless error for a sentencing judge to deny the defendant or his attorney access to that part of a presentence report which notes any prior record of arrests and convictions. See, also, *State v. Carey*, 199 Neb. 288, 258 N.W.2d 141 (1977). In the present case, however, the court did permit the defendant and his counsel to inspect the written presentence report. However, the defendant claims that he was denied an adequate opportunity to inspect the report because he was not allowed to respond to the recommendations made by the probation officer to the sentencing judge. Judge Reagan, at the time of the arraignment proceedings, indicated to the defendant that he would ask the probation office to compile information to be included in the presentence report and which, among many other things, would be utilized in determining the sentence to be imposed. The recommendation of the probation officer is just one of numerous considerations taken into account by the sentencing judge, and the recommendation in no way binds the judge in determining the sentence to be imposed. *State v. Steed, supra.* As indicated in § 29-2261(5), it is within the discretion of the sentencing judge to allow inspection of a probation officer's presentence report, which discretion is, of course, reviewable by this court. In this case we conclude that the sentencing judge did not abuse his discretion. See *State v. Keller*, 195 Neb. 209, 237 N.W.2d 410 (1976).

The defendant also contends that the sentence he received was excessive in comparison to the sentence imposed upon his codefendant, Dennis Paulson. The court, after reviewing the presentence reports of both Stranghoener and Paulson, concluded that Stranghoener's involvement in the murder of Goslee was greater than that of his codefendant, Paulson;

and therefore, after sentencing Paulson to 15 years' imprisonment, sentenced Stranghoener to 20 years' imprisonment. We cannot conclude from the record that the trial judge abused his discretion in so doing. In *State v. Etchison*, 188 Neb. 134, 137-38, 195 N.W.2d 498, 501 (1972), we stated: "The primary function of the criminal law is to protect individuals and society from the depredations of the criminally bent. In furtherance of this purpose, it is deemed necessary to mete out punishment as a deterrent to others and to lock up incorrigible criminals. On the other hand, the rehabilitation of criminals is one of society's major safeguards. Among factors meriting consideration are the family ties, age, mentality, education, experience, and social and cultural background of the convicted individual; his willingness to work at honest labor; his past criminal record or law abiding conduct; the motivation for the offense, the nature of the offense, and the amount of violence, if any, involved; the frankness and willingness of the defendant to cooperate; narcotic addiction, if any; circumstances aggravating or mitigating the offense; community attitudes toward the offense; and the individual's potentialities for reform or recidivism." Concededly, it is difficult, if not impossible, to accurately "color match" records of codefendants to determine the varying degrees of punishment each should receive. In this regard, the court is granted considerable discretion and latitude in making that decision.

In the instant case it appears from the presentence report that Stranghoener is married, has two children, was 27 years of age at the time of the crime, had serious mental problems, had a 10th grade education, and an antisocial personality. He has changed jobs frequently and has a prior record of suspected larceny from an automobile, injury-warrant, speeding, and trespassing. He is also an alcoholic who takes drugs whenever he can get them. According to the presentence report, his chances for reform are small. On the other

hand, according to Paulson's presentence report, he was 27 years of age at the time of the crime and attended school to the 10th grade, completing his G.E.D. during the 2 years he was in the Marines. Upon receiving a general discharge, he completed an automobile mechanics course while he was serving a 1- to 3-year sentence in the Nebraska Penal Complex for forgery. He was paroled in less than a year and discharged in a little over 2 years. The only other criminal charges against him for which he was sentenced were in 1978, they being possessing liquor on public property and having an open container. His work record includes about 1 year with a meat processor in Omaha while he was on parole, 6 months with another meat processor in Omaha, and about 8 months with Omaha Temporaries. While Paulson appears to have been the leader of the "family," the murder occurred in Stranghoener's home; and it also appears that Stranghoener provided the rifle used by McGee to shoot Goslee, and also the shotgun used by Paulson to cover McGee. Stranghoener helped to dispose of the body and of the murder weapon, while Paulson did not participate in the disposal of the body or the weapon. Both Stranghoener and Paulson were charged with first degree murder, which charges were reduced to second degree murder in exchange for pleas of guilty.

Under the provisions of Neb. Rev. Stat. § 28-304 (Reissue 1979) murder in the second degree is classified as a Class IB felony. Neb. Rev. Stat. § 28-105 (Reissue 1979) provides that the penalty for a Class IB felony is a maximum of life imprisonment and a minimum of 10 years' imprisonment. However, under our present statutes, we have held that upon conviction for second degree murder, the court is not authorized to pronounce an indeterminate sentence, but may impose a sentence of a definite term of years not less than the minimum authorized by law; or, in the alternative, may impose a sentence of life imprisonment. *State v. Randall*, 208 Neb. 248, 302 N.W.2d 733

(1981); *State v. Laravie*, 192 Neb. 625, 223 N.W.2d 435 (1974). The sentences imposed by the trial judge upon both Stranghoener and Paulson clearly comply with the requirements for sentences in second degree murder cases, and hence cannot be considered as excessive, particularly in consideration of the fact that as a result of their respective plea bargains they each had their charges reduced from first degree murder to second degree murder.

Our conclusion is, therefore, that the sentence of the trial court given Stranghoener of 20 years' imprisonment was not excessive, either in the abstract, or in comparison to the sentence meted out to Paulson; that the court did not abuse its discretion; and that said sentence should be and hereby is affirmed.

AFFIRMED.

JED CONSTRUCTION COMPANY, INC., A CORPORATION, APPELLANT, V. GENE LILLY, DOING BUSINESS AS GENE LILLY SURETY BONDS AND INSURANCE, APPELLEE.

305 N.W.2d 1

Filed April 24, 1981. No. 43218.

1. **Issue Preclusion.** For the theory of issue preclusion to bar further litigation on a specific issue, the issue concluded must be identical, must have been raised and litigated in the prior action, must have been material and relevant to the disposition of the prior action, and the determination made of the issue in the prior action must have been necessary and essential to the resulting judgment.
2. ——. Identity of parties is not necessary to give validity to a claim of issue preclusion.
3. ——. A stranger to a primary suit can assert the theory of issue preclusion as a defense in a subsequent suit provided other elements of the theory of issue preclusion coincide.

Appeal from the District Court for Lancaster County: HERBERT A. RONIN, Judge. Affirmed.

Kenneth Cobb of Law Offices of Kenneth Cobb, P.C., for appellant.

Knudsen, Berkheimer, Beam, Richardson & Endacott for appellee.

Heard before KRIVOSHA, C.J., BOSLAUGH, MCCOWN, CLINTON, BRODKEY, WHITE, and HASTINGS, JJ.

CLINTON, J.

This is an action brought in the District Court for Lancaster County, by JED Construction Company, Inc., against Gene Lilly, its alleged agent, doing business as Gene Lilly Surety Bonds and Insurance, an insurance broker, to recover damages alleged to have been suffered because Lilly violated his instructions and exceeded his authority while acting as such agent in not causing an application for an indemnity agreement and a contractor's bond and indemnity agreement executed by JED in blank to be completed in accordance with the terms of the actual agreement. The beneficiary of the indemnity agreement was Universal Surety Company which, in reliance on the indemnity, issued a performance bond to Erik Hansen Construction Co. in connection with the construction of an addition to Norris Junior-Senior High School. In the case of *Universal Surety Co. v. Jed Constr. Co., Inc.*, 200 Neb. 712, 265 N.W.2d 219 (1978), this court affirmed a judgment which Universal Surety obtained against JED on the indemnity agreement in the amount of $61,872.68 and denied an offset of $18,516.12 claimed by JED on its counterclaim. A more detailed statement of the facts surrounding the transaction is set forth in the above case and we will not repeat those facts except as necessary for an understanding of the issue here presented.

JED, in this action, seeks to recover from Lilly the amount it was required to pay in the case of *Universal Surety Co. v. Jed Constr. Co., Inc., supra*, as well as other expenses in connection with that litigation.

The issues in this case were submitted to the jury, which rendered a judgment for Lilly. JED then appealed to this court, assigning various errors pertaining to instructions given to the jury or refused by the court and an error in connection with the reception of evidence.

In his answer Lilly pleaded, among other defenses: "[T]hat if the Amended Petition states any cause of action, such action is barred and estopped by principles of collateral estoppel and res judicata for the reason that all issues raised by the Amended Petition have been concluded by the judgment of the District Court of Lancaster County, Nebraska in *Universal Surety Co. v. JED Construction Co.*, Docket 296, Page 244, which judgment was duly given."

At trial Lilly introduced and there was received in evidence the transcript and bill of exceptions in *Universal Surety Co. v. Jed Constr. Co., Inc., supra.* Lilly, after both parties had rested, asked the trial court for a directed verdict for the defendant on the ground of collateral estoppel or, as it is more usually referred to, issue preclusion. The trial court reserved ruling on that motion and, after the jury verdict, held that the issue was moot and did not rule thereon.

Lilly, on this appeal, responds to the claims of error but also urges that even if there was error it was immaterial because, in any event, its motion for a directed verdict, based upon issue preclusion, should have been granted. We sustain this contention, hence it becomes unnecessary for us to examine JED's assignments of error.

In the prior case, among the issues decided were: (1) What was the actual agreement, and (2) The nature and extent of Lilly's authority and instruction. The first issue depended upon the facts in the second. In the previous action JED maintained that Lilly was the agent of Universal Surety. In this action it claims that Lilly was its agent. However, be that as it may, the issue of Lilly's authority and whether he acted in accordance with instructions from JED was an

issue in both cases and was decided against JED in the previous action. JED had an opportunity to and did fully litigate those issues in the prior action. We quote from JED's brief in the previous case. "Applying the principle that the form contract must be completed in accordance with the authority granted, it is clear that the Form 2 is subject to reformation on the basis that Universal *failed to conform it to the oral agreement reached between JED and Eugene Lilly*, Universal's agent. The Form 2 could easily have been so conformed via deletions and insertion of superseding language in blank spaces, including that reserved for Paragraph 17. JED does not dispute that an agreement existed whereby it was to indemnify Universal, but the Form 2 does not constitute that agreement and should be reformed." (Emphasis supplied.)

Lilly testified as a witness in the previous action, as did the officers of JED. Both Lilly and the officers testified in the case before us. Their testimony relates Lilly's authority and instructions given him by JED. The issue now before us was before us on the earlier appeal. In our opinion in *Universal Surety Co. v. Jed Constr. Co., Inc., supra*, we said at 714-15, 265 N.W.2d at 221: "Jed advances two theories, mutual mistake of fact and failure to complete the agreement according to its terms. Mistake as a ground for reformation of a contract must be a mutual mistake. [Citations omitted.]

"It is conceded that the officers of Jed did not read the contract and that they did not even talk with an agent or officers of Universal. The evidence does not show that the claimed mistakes were ever discussed with Lilly prior to the signing in blank by Jed's officers. The officers of Jed testified that the agreement they signed contained provisions different from the actual agreement. There is no evidence that Universal thought the terms of the contract were other than those contained in the actual agreement. Even if the officers of Jed were mistaken, it was a unilateral

mistake rather than a mutual one. Furthermore, one who does not read a contract before signing it cannot relieve himself of its burdens. [Citations omitted.]

"The second theory fails for the reasons discussed above. No evidence was offered tending to prove that the agreement was to be completed to include the provisions relating to exhaustion of the assets of the Hansens, retainage, or consent to extras. Again, the evidence could only establish that the Jed officers may have intended or thought that the agreement contained those provisions."

In *Peterson v. The Nebraska Nat. Gas Co.*, 204 Neb. 136, 281 N.W.2d 525 (1979), we held: "Collateral estoppel may be applied if the identical issue was decided in a prior action, there was a judgment on the merits which was final, the party against whom the rule is to be applied was a party or in privity with a party to the prior action, and there was an opportunity to fully and fairly litigate the issue in the prior action.

"Mutuality of estoppel is no longer considered to be a requirement for the application of collateral estoppel." (Syllabi of the court.) In that case The Nebraska Natural Gas Company was a defendant in a prior action where the issues of its negligence and legal responsibility for a gas explosion were litigated and a verdict was rendered against it. In *Peterson v. The Nebraska Nat. Gas Co., supra*, the negligence issue was the same as that in the prior case but a different injured party was plaintiff.

The Supreme Court of Iowa has given a clear exposition of the principles of issue preclusion in the case of *Schneberger v. United States Fidelity & Guar. Co.*, 213 N.W.2d 913 (Iowa 1973). The court there held at 917: "To bar further litigation on a specific issue four requirements must be established:

"(1) The issue concluded must be identical.

"(2) The issue must have been raised and litigated in the prior action.

"(3) The issue must have been material and relevant to the disposition of the prior action, and

"(4) The determination made of the issue in the prior action must have been necessary and essential to the resulting judgment. [Citations omitted.]

"Identity of parties is not necessary to give validity to a claim of issue preclusion. A stranger to a primary suit can assert the theory of issue preclusion as a defense in a subsequent suit provided other elements of the theory of issue preclusion coincide."

Professor Allan D. Vestal, in his text Res Judicata/ Preclusion (1969), analyzes the various situations in which issue preclusion might arise. At V-317 he says: "In these situations where the losing defendants take the offensive and initiate subsequent lawsuits, it is very helpful to apply the test of reasonable expectations. Here it would again appear obvious that the person who once loses after having had his day in court would not be reasonable in expecting to be able to recover later when he sues someone not a party to the first suit. It is completely reasonable to hold that the nonparticipating nonparty to the first suit is able to assert preclusion against a plaintiff in the second suit if the plaintiff in Suit II was a losing party in the first suit, regardless of the position he occupied in Suit I.

"In these situations in which a defendant in Suit I has had an opportunity to present his side of a controversy fully and completely and has lost, it seems completely unreasonable to say that he can then start an action as a plaintiff and relitigate the matters which have been decided against him. Such a party should be bound by the decision which has been handed down."

For the reasons set forth we affirm the judgment for the defendant.

AFFIRMED.

ELSIE HAGERBAUMER, APPELLANT, V. HAGERBAUMER BROTHERS, INC., APPELLEE.

305 N.W.2d 4

Filed April 24, 1981. No. 43245.

1. **Contracts.** A subsequent contract which does not completely cover the same subject matter of a prior agreement and does not contain terms inconsistent with the former contract so that the two cannot stand together does not supersede or substitute for the earlier contract and become the only agreement of the parties.
2. ____. A contract complete in itself will be conclusively presumed to supersede and discharge another one made prior thereto between the same parties concerning the same subject matter, where the terms of the latter are inconsistent with those of the former so that they cannot subsist together.

Appeal from the District Court for Washington County: WALTER G. HUBER, Judge. Reversed and remanded with directions.

James M. Davis of Dolan, Dinsmore & Davis for appellant.

Neil W. Schilke of Sidner, Svoboda, Schilke, Wiseman & Thomsen for appellee.

Heard before KRIVOSHA, C.J., BOSLAUGH, MCCOWN, CLINTON, BRODKEY, WHITE, and HASTINGS, JJ.

WHITE, J.

This is an action by a stockholder in a closely held family corporation to compel the defendant-appellee corporation to purchase 666 shares of stock in the appellee corporation in accordance with a Buy and Sell Agreement executed October 22, 1976, between the corporation and all stockholders. The trial court determined that the agreement of October 22, 1976, had been rescinded by an agreement of July 1977 and that there was no duty on the part of the corporation to purchase the shares from the appellant, and therefore denied relief. We reverse and remand.

The original stockholders of the appellee, Hagerbaumer Brothers, Inc., were Obert and Elsie Hager-

baumer (Elsie being appellant herein) and their three children, Ardean, Gorlyn, and Leewane. The corporation operated farms and carried on extensive cattle feeding operations in Washington County, Nebraska. Although generally successful in the farming operation, in the early 1970's the company had experienced severe financial reverses because of a downturn in the cattle market. The history of the relationship between the stockholder-parents and the stockholder-sons, and among one another, has been stormy and, at times, violent. There are issues raised by the appellant in her petition suggesting that the agreement of 1977 was compelled by duress and fraud practiced on her, but as these issues are not necessary for a determination of the case, they will not here be considered.

The 1976 agreement entitled "Buy And Sell Agreement" has as its declaration of purpose: "[T]o make provision for the future disposition of the shares of capital stock of the Corporation, and to provide that such shares shall be transferable only upon compliance with the terms hereof . . . ."Appellant attempted to have the corporation redeem her stock under the following paragraph: "3. Sale During Life. A Stockholder desiring, during his lifetime, to sell or otherwise encumber his stock shall first give the other stockholders at least ninety days written notice by registered or certified mail of his intention to sell or dispose of any part or all of his stock. The remaining stockholders shall have the exclusive right and option during said ninety day period to purchase said stock. In the event that the Stockholders do not exercise this right, the Corporation must purchase all such shares of stock upon these terms and conditions: . . . ." The record is clear that appellant complied with all notice provisions and that both the remaining stockholders and the corporation refused to purchase the shares. Upon the corporation's refusal to purchase the shares, appellant brought this action.

The occasion for the execution of the 1977 agreement was the difficulties, both financial and personal, which arose between the brothers in the operation of the farm corporation. Their father, Obert, had died in April 1977 and the three brothers were unable to agree with respect to assignment of duties and certain benefits to Leewane by way of housing and automobiles; and, as a result, negotiations were commenced, at the request of a financial institution which had lent considerable money to the corporation to finance the cattle operation, to settle the status as to who should operate the corporation. The agreement principally provided for the deposit in escrow and the retirement of Leewane's stock and the agreement by the corporation to buy the stock over a period of years at specified yearly payments with interest. However, the agreement contained the following provision: "9. This agreement for the purchase of the stock of Leewane must of necessity comply with the request and requirements of the Arlington State Bank from which the necessary financing must be obtained. The bank understandably recognizes that it must work with the operators of the company for some years and as a community bank is interested in assuring that the operaion [sic] is successful and for the benefit of all parties concerned. It is contemplated that Gorlyn and Ardean will do the work for the corporation both as to physical labor and management and that any increase in value of the corporation will result substantially from their efforts and similarly a failure of the company will result in Ardean and Gorlyn taking the bulk of the loss by reason of their investment of time, labor and effort in the company. Therefore, it is important that the disposition of the remaining outstanding 666 shares of stock held by Elsie be determined. In order to obtain the necessary financing and secure fairness for all parties concerned, Elsie agrees that she will not at any time dispose of her shares of stock by gift, or bequest in

such manner that Ardean and Gorlyn would each receive less than one-third of such shares. It is contemplated that the remaining one-third of her shares would pass to Leewane but inasmuch as he will not be an active member of the company there is no binding agreement as to this one-third. It is further agreed that any such transfers will be made simultaneously so that at any given time Gorlyn and Ardean will each receive one-third of any shares transferred by Elsie. *This agreement does not preclude the sale of shares of stock by Elsie but in the event of sale other than as redemption by the Company Gorlyn and Ardean shall each have the right to purchase one-third of any shares of stock offered for sale by Elsie on the terms and conditions of any such bona-fide offer of sale and Elsie shall give Ardean and Gorlyn at least 30 days written notice of the terms and conditions of any proposal for the purchase of such stock and Gorlyn and Ardean will have 30 days after receipt of such notice to advise Elsie in writing as to whether or not the wish to exercise their option to purchase.*" (Emphasis supplied.)

Paragraph 11, that part referred to by the appellee corporation and the trial court in the determination that the 1977 agreement rescinded the 1976 agreement, provides as follows: "Each party hereto by entering into this agreement releases each other party and the Company from any and all claims for liability compensation, reimbursement or other claim of whatever nature, whether now known or unknown and whether now liquidated or unliquidated." The 1977 contract was not executed on behalf of the corporation.

It was the obvious purpose of both the first and second agreements that outsiders not be permitted to own stock in the appellee corporation. In their testimony, Gorlyn and Ardean testified that they opposed the purchase of the stock by the corporation for the reason that it would deplete seriously the working capital of the corporation and that the future of the corporation

would therefore be in doubt; and further, if the proceeds from the sale of the shares of Elsie were paid over to her, she would then be free to leave the money to Leewane or to do with it as she chose instead of distributing the value of her stock one-third each to Leewane, Ardean, and Gorlyn. It is obvious from a comparison of the plain language of paragraph 3 of the original Buy and Sell Agreement and paragraph 9 of the 1977 stock-purchase agreement that the two do not conflict. Indeed, the right of Elsie to sell the stock is reaffirmed; the right of the other three then existing stockholders to purchase is affirmed; and any purported cancellation of the right of Elsie to compel the corporation to purchase the stock in the event of refusal by the remaining shareholders is simply not mentioned.

In fact, paragraph 9 of the 1977 agreement even contemplates redemption by the company by providing that the right of Ardean and Gorlyn to purchase one-third each of Elsie's shares only applies to sales other than as redemption by the company.

A subsequent contract which does not completely cover the same subject matter of a prior agreement and does not contain terms inconsistent with the former contract so that the two cannot stand together does not supersede or substitute for the earlier contract and become the only agreement of the parties. *Walsh v. Lunney*, 75 Neb. 337, 106 N.W. 447 (1905). *Accord, Cooperative Refinery Ass'n v. Consumers Public Power D.*, 190 F.2d 852 (8th Cir. 1951).

The rule has also been stated that: "'A contract complete in itself will be conclusively presumed to supersede and discharge another one made prior thereto between the same parties concerning the same subject matter, *where the terms of the later are inconsistent with those of the former, so that they cannot subsist together.*'" (Emphasis supplied.) *In re Estate of Wise*, 144 Neb. 273, 282, 13 N.W.2d 146, 152 (1944); *Goings v. Gerken*, 200 Neb. 247, 263 N.W.2d

655 (1978); *Price v. Platte Valley Public Power and Irrigation District*, 139 Neb. 787, 298 N.W. 746 (1941).

An examination of the two contracts does not disclose inconsistencies sufficient for the presumption to obtain. The subject of the possible sale of the stock to the corporation in the event of a refusal of the remaining stockholders to purchase is referred to, as above noted, in the 1977 agreement. It cannot be said that this provision is inconsistent with the provision of the earlier contract which compelled the corporation to buy in the event of such refusal. The judgment of the trial court was therefore incorrect, and we reverse and remand.

There are other issues raised in the proceedings below that were not decided by the trial court or discussed by this court, i.e., whether or not under the terms of the agreement there was a binding agreement on Elsie to distribute the shares held by her in the corporation to each of her three sons, one-third each, and that a resulting trust should therefore be imposed on the proceeds. These matters will necessarily be decided by the trial court on remand.

REVERSED AND REMANDED WITH DIRECTIONS.

EUGENE H. ALLEMAND ET AL., APPELLEES, V. ROBERT WEAVER EL AL., APPELLEES, JULIE EDWARDS ET AL., APPELLANTS.

305 N.W.2d 7

Filed April 24, 1981. No. 43317.

1. **Wills.** It is a natural presumption that a testator making his will intended to dispose of his whole estate and not to die intestate as to any part of it, and in construing doubtful expressions this presumption has weight, but it cannot supply the actual intent of the testator to be derived from the language of the will.

2. ____ It is not the province of the courts by construction to supply omissions or to write residuary clauses for testators who neglect to do so.
3. ____ The object and purpose of the court is to carry out and enforce the true intention of the testator as shown by the will itself, in the light of attendant circumstances under which it was made.
4. ____ Ordinarily, a class gift is a gift to two or more persons who are not named and who have one or more characteristics in common by which they are indicated or who answer to a general description.
5. ____ If the gift is made to beneficiaries by name, the gift is, prima facie, not one to a class, even if the individuals who are named possess some quality or characteristic in common. This is particularly true if the beneficiaries are not described as having some quality or attribute in common.
6. ____ Where the language of a will is not conclusive but rather ambiguous, the court must determine the intent of the testator to the extent possible from the terms of the will itself.

Appeal from the District Court for Richardson County: WILLIAM F. COLWELL, Judge. Affirmed.

Charles D. Hahn of McKnight, Hahn, Hahn, Fuller & Chatelain for appellants.

Weaver, Beekman & Merz for appellees.

Heard before KRIVOSHA, C.J., BOSLAUGH, MCCOWN, CLINTON, BRODKEY, WHITE, and HASTINGS, JJ.

WHITE, J.

This is an appeal from the District Court for Richardson County, Nebraska, from a decree in a quiet title action assigning shares and ordering partition of certain real estate.

At issue in the District Court was the construction of paragraph III in the will of Albert W. Weaver which read as follows: "I give, bequeath and devise to my beloved wife, Edna May Weaver, all real estate which I may own at the time of my death, for and during her natural life; at her death the remainder in said real estate shall vest in my surviving brothers and sisters as follows:

"In Frank Weaver, an undivided one-fifth (1/5) part.
"In George Weaver, an undivided one-fifth (1/5) part.
"In Lulu Wixon, an undivided one-fifth (1/5) part.

"In Effie Weddel, an undivided one-fifth (1/5) part. and in the children of my deceased sister, Pearl Allemond, an undivided one-fifth (1/5) part. If any of my above named brothers or sisters shall die before my death, their children shall take the same share in my estate as such deceased brother or sister would have taken if they had survived me."

The testator, Albert W. Weaver, was predeceased by George Weaver, a brother. George Weaver died on March 11, 1954. Albert W. Weaver, the testator, died on July 18, 1954. George Weaver died leaving no children or other issue surviving him.

Since there is no residuary clause in the will, the bequest to George Weaver would have lapsed at the testator's death and passed under the laws of intestacy as they read in 1954 if the devise in paragraph III was a distributive devise. Under Neb. Rev. Stat. § 30-101 (Cum. Supp. 1953), one-half of George's share would have gone in fee simple to Edna May Weaver, the testator's wife, and upon her death in 1979, to appellants who are distributees and legatees under her will. However, if paragraph III created a class gift, George's share would have been divided equally among the testator's surviving brothers and sisters and the issue of deceased brothers and sisters by representation. The trial court found that paragraph III created a class gift and the remainder interest in the testator's real estate belonged in equal shares to appellees who are the heirs of Albert's now deceased brothers and sisters. This appeal followed, the question for decision being whether paragraph III created a class devise or a distributive devise.

The effect of holding the devise in paragraph III to be to individuals, rather than a gift to a class, would render the testator intestate as to a one-fifth share of the real estate disposed of in the paragraph since the will had no residuary clause. There are certain principles to be followed in the construction of this paragraph: First, "'It is a natural presumption that a testator making his will

intended to dispose of his whole estate and not to die intestate as to any part of it, and in construing doubtful expressions this presumption has weight, *but it cannot supply the actual intent of the testator to be derived from the language of the will.'" Katt v. Claussen*, 174 Neb. 603, 611, 118 N.W.2d 1002, 1007 (1963); *Jacobsen v. Farnham*, 155 Neb. 776, 53 N.W.2d 917 (1952).

"It is not the province of the courts by construction to supply omissions or to write residuary clauses for testators who neglect to do so." *Katt* at 610, 118 N.W.2d at 1006.

"The object and purpose of the court is to carry out and enforce the true intention of the testator as shown by the will itself, in the light of attendant circumstances under which it was made." (Syllabus of the court.) *In re Estate of Dimmitt*, 141 Neb. 413, 3 N.W.2d 752 (1942).

"Ordinarily, a class gift is a gift to two or more persons who are not named and who have one or more characteristics in common by which they are indicated or who answer to a general description." *Katt* at 608, 118 N.W.2d at 1005.

"'If the gift is made to beneficiaries by name, the gift is, prima facie, not one to a class, even if the individuals who are named possess some quality or characteristic in common. This is particularly true if the beneficiaries are not described as having some quality or attribute in common.'" *Katt* at 609, 118 N.W.2d at 1006.

It can be seen that paragraph III of the will possesses both characteristics of a class gift and characteristics of an individual gift. The characteristics of a class are the description of a group having common characteristics, i.e., brothers, sisters, or heirs of deceased brothers and sisters. The paragraph possesses some indication of a gift not to a class by the recitation of the individual names of the beneficiaries, including the brothers and sisters and the children of a deceased sister and by the specification of their shares. Since the language itself is not conclusive but rather ambiguous, we must determine the intent of the testator to the

extent possible from the terms of the will itself.

The will of Albert W. Weaver consists of four paragraphs. In the first paragraph he directs that his just debts be first paid out of his personal estate. Paragraph II is as follows: "All the residue of my *personal* estate, of every kind and nature, I give and bequeath to my beloved wife, Edna May Weaver." (Emphasis supplied.) Paragraph III, set forth above, refers to real estate. Paragraph IV names Edna May Weaver executrix, and provides that in the event Edna May Weaver does not survive the testator, the court appoint a suitable person to act as a personal representative. The obvious intent of the will, gathered from the instrument, was to dispose of all the property which the testator possessed. Total personal property was assigned for the payment of debts and cost of administration, and any balance thereof to the testator's widow. The widow was granted only a life estate in the real estate and the remainder in the real estate was assigned to his own brothers and sisters. It is obvious from the will that the testator intended that the real estate remain in his own family after making suitable provisions for his widow. The absence of a residuary clause, although not conclusive, suggests that it was the impression of the testator that there was nothing to dispose of by a residuary clause; that everything had been disposed of by the will. From a reading of the four corners of the instrument, it is therefore our conclusion, as it was the conclusion of the trial court, that the testator intended the gifts described in paragraph III to be a gift to a class and not to individuals; that he intended to dispose of all his real estate and to have the same remain in his own family; and not to die intestate as to any part of the property.

The judgment of the trial court is in accordance with these findings and is therefore affirmed.

AFFIRMED.

IN RE INTEREST OF SWANNIE ELIZABETH MCKEE, A CHILD UNDER 18 YEARS OF AGE. STATE OF NEBRASKA, APPELLEE, V. RICHARD MCKEE AND MARY MCKEE, NATURAL PARENTS, APPELLANTS.

304 N.W.2d 918

Filed April 24, 1981. No. 43399.

1. **Juvenile Courts: Appeal and Error.** An appeal of a juvenile case to this court is heard de novo upon the record; and the findings of fact by the trial court which heard and observed the witnesses and parties are accorded great weight and will not be set aside on appeal unless they are against the weight of the evidence or there is a clear abuse of discretion.
2. **Parental Rights.** An order of the juvenile court terminating parental rights under Neb. Rev. Stat. § 43-209 (Reissue 1978) must be supported by clear and convincing evidence.
3. ——. When natural parents cannot rehabilitate themselves within a reasonable time after the adjudication hearing, the best interests of the child require that a final disposition be made without delay.

Appeal from the Separate Juvenile Court of Douglas County. Affirmed.

H. Jerome Kinney for appellant.

Donald L. Knowles, Douglas County Attorney, and Francis T. Belsky for appellee.

Heard before KRIVOSHA, C.J., BOSLAUGH, MCCOWN, CLINTON, BRODKEY, WHITE, and HASTINGS, JJ.

BRODKEY, J.

Richard and Mary McKee, appellants and natural parents herein, appeal to this court from an order entered by the separate juvenile court of Douglas County, Nebraska, terminating the parental rights to their child, Swannie Elizabeth McKee, born February 27, 1979. We affirm.

The facts which comprise the background of this matter indicate that on March 30, 1979, the Douglas County Attorney filed a petition in the juvenile court alleging that Swannie McKee was a child within the meaning of Neb. Rev. Stat. § 43-202(1) (Reissue 1978),

in that the child was under the age of 18 and without proper support through no fault of her parents. The petition also alleged that Richard and Mary McKee were unable to discharge their parental responsibilities because they were mentally retarded. In an order entered on that same date, the juvenile court ordered that temporary custody of the child be placed with Douglas County Social Services. The cause was continued for a detention hearing on April 10, 1979, at which time it was established that the Child Protective Services of Douglas County had received a referral from the University of Nebraska Medical Center concerning the infant McKee in March of 1979. At that time Swannie was 2 weeks old, but had gained only one-tenth of a pound in body weight and was experiencing internal bleeding, as evidenced by bloody stools. Testimony at the detention hearing established that the proximate cause of the infant's internal bleeding was the fact that the natural mother had been feeding the baby table foods, such as canned fruit, vegetables, and meat. It was also established that Mary McKee experienced difficulties in understanding instructions on how to care for her child, and that both parents demonstrated poor "parenting" skills. The juvenile court determined that it was in the best interests of Swannie McKee that she remain in the temporary custody of Douglas County Social Services until an assessment could be made as to whether or not Richard and Mary were capable of taking care of the child.

Following a court-ordered psychological evaluation of both parents, an adjudication hearing was held on June 26, 1979. At that time the natural parents admitted that their child was a child within the meaning of § 43-202(1). The court admitted the psychological evaluations into evidence. On July 18, 1979, the court ordered that custody of Swannie McKee be placed in the State Department of Public Welfare for temporary foster care under the supervision of Douglas County Social Services, and also ordered that Richard and

Mary participate in rehabilitative programs, such as mental health counseling, nutrition, positive "parenting," and financial planning.

It next appears that on January 25, 1980, the Douglas County Attorney filed a motion seeking the termination of the parental rights between Richard and Mary McKee as to Swannie McKee. The motion alleged in pertinent part:

"IV. That Swannie Elizabeth McKee comes within the meaning of Nebraska Revised Statutes, Section 43-209 (6) R.S. Supp. 1978, because reasonable efforts, under the direction of the Court, have failed to correct the conditions leading to the aforementioned determination, to wit: A. That the natural parents were ordered by the Court to become involved in mental health counseling and a nutrition program on a regular basis. Both parents have failed, neglected, or refused to involve themselves in both mental health counseling and any nutrition program. B. That the natural parents have failed to become involved in a financial planning program as ordered by the Court. C. That the natural parents have failed to cooperate with the Child Protective Service worker, the Visiting Nurse's Association, Foster Care worker, the Juvenile Court service officer, and the ENCOR worker as ordered by the Court.

"V. That Swannie Elizabeth McKee comes within the meaning of Nebraska Revised Statutes, Section 43-209 (5) R.S. Supp. 1978 because her natural parents are unable to discharge their parental responsibilities because of mental deficiency and there are reasonable grounds to believe such condition will continue for a prolonged indeterminate period, to wit: A. On or about September 28, 1979, Mary McKee, natural mother of said child, was psychiatrically evaluated and diagnosed as being mentally retarded; suffering from epilepsy; evidencing immature behavior; and functioning at the third grade level. B. On or about April 18, 1979, Mary McKee and Richard McKee, natural parents of said

child, were psychologically evaluated. The recommendation of the clinical psychologist was that the child, Swannie Elizabeth McKee, should not be returned to the possession and custody of her natural parents."

On February 27, 1980, a hearing on the motion for termination of parental rights was held, at which time the testimony of Barbara Schuett, the clinical psychologist who had previously examined Richard and Mary McKee, and Dr. Shashi Bhatia, a child psychologist who had also examined Mary McKee, was presented by the State. Both experts testified that their opinion was that Swannie McKee should not be returned to her natural parents because they had not learned the minimum requirements necessary for child care. Barbara Schuett also concluded, to the best of her professional knowledge, that the mental condition of both Richard and Mary McKee would continue for a prolonged indeterminate period. This likewise was the conclusion of Dr. Bhatia as to Mary. Based upon this testimony, the juvenile court found that Swannie McKee was a child within both subsections (5) and (6) of Neb. Rev. Stat. § 43-209 (Reissue 1978) and ordered that the McKees' parental rights be terminated. A subsequent motion for new trial was overruled, and the appellants have appealed to this court, contending that the evidence presented was not sufficient to terminate their parental rights under § 43-209.

At the outset, we note that an appeal of a juvenile case to this court is heard by trial de novo upon the record; and also that the findings of fact by the trial court which heard and observed the witnesses and parties will be accorded great weight, and those findings will not be set aside on appeal unless they are against the weight of the evidence or there is a clear abuse of discretion. *In re Interest of Morford*, 207 Neb. 627, 300 N.W.2d 795 (1981); *State v. Duran*, 204 Neb. 546, 283 N.W.2d 382 (1979); *State v. Logan*, 204 Neb. 204, 281 N.W.2d 753 (1979). We have also held that an order of the juvenile

court terminating parental rights under § 43-209 must be supported by clear and convincing evidence. *In re Interest of Hill*, 207 Neb. 234, 298 N.W.2d 143 (1980); *State v. Hamilton*, 204 Neb. 537, 283 N.W.2d 66 (1979); *State v. Souza-Spittler*, 204 Neb. 503, 283 N.W.2d 48 (1979).

Section 43-209, the juvenile court act dealing with the termination of parental rights, reads in pertinent part as follows: "The court may terminate all parental rights between the parents or the mother of a child born out of wedlock and such child when the court finds such action to be in the best interests of the child and it appears by the evidence that *one or more* of the following conditions exist: . . . (5) The parents are unable to discharge parental responsibilities because of mental illness or mental deficiency, and there are reasonable grounds to believe that such condition will continue for a prolonged indeterminate period; or (6) Following upon a determination that the child is one as described in subdivision (1) or (2) of section 43-202, reasonable efforts, under the direction of the court, have failed to correct the conditions leading to the determination." (Emphasis supplied.)

In this regard, we have also held that parental rights may be terminated for any one of the six independent circumstances referred to in the above statute authorizing termination of parental rights. *State v. Burger*, 205 Neb. 340, 288 N.W.2d 22 (1980); *In re Interest of Morford*, *supra*.

With the foregoing statutes and rules in mind, we conclude that the evidence contained in the record clearly supported the decision of the juvenile court to terminate the parental rights of Richard and Mary McKee. We note that the psychological evaluation of Mary McKee, admitted by the court as exhibit 2, concludes that: "Mary is a small, 29-year-old woman who appears approximately ten years younger than her age. Grooming was marginal. She was spontaneous in interview. At times she would become angry and hostile and

want to terminate the testing, but was easily persuaded back into the evaluation. Mary would not discuss her marriage and was quite defensive about this. The examiner wonders if there are problems in this marriage between her and her husband, and if so, what they are. Not wanting to talk about her marriage would tend to lead one to believe that there were problems of some nature. The questions asked about her marriage were certainly not of an intimate nature.

"Mary functions in the retarded range, achieving at a second or third grade level. She is an epileptic and does not take her medication regularly. Personality and behavior are quite typical of the epileptic.

"*Recommendation:* In the examiner's opinion, this child should not be returned to Mary and her husband for the following reasons: 1. Mary has inadequate knowledge of the appropriate child care and expectations for her child. 2. She does not have the mental capacity to learn the minimum requirements in child care. 3. She uses very poor judgment and reasoning ability. 4. Mary over-reacts to environmental stress, usually in an angry, aggressive manner. 5. Mary takes inadequate care of herself. 6. Even if given support by various agencies, would be inadequate in this examiner's opinion, as she would have all the remaining hours in each day to be responsible for this child.

"In the examiner's opinion, returning the child would deny this child the opportunity to develop to its fullest capacity and the child would be 'set up' to be neglected and also probably physically abused."

Richard McKee's psychological evaluation, which was admitted by the juvenile court as exhibit 4, concluded: Richard comes across as a very inadequate individual in most areas, especially socially. He presented himself for this evaluation in a very filthy condition, however the examiner realizes that his water has been turned off for several weeks. He was not wearing his hearing aid, even though much work had been done by another individual to be sure that it was ready for him prior to this

evaluation. Richard did not take the responsibility of going to get the hearing aid. He does not work, nor does he want to. He has no hobbies or interests and shows little, if any, motivation. Richard functions in the mild range of retardation and is achieving at a first and second grade level. He has a rather significant speech problem and is difficult to understand. Personality pattern is consistent with mental retardation, with features of the inadequate personality. Richard gives himself inadequate care and seems to be a very dependent person.

"The examiner would recommend that this child not be returned to its natural parents. Mary has many inadequacies which are indicated in her report. Richard cannot be depended upon to be a help in this marriage and parenting. All the care would be left up to Mary. Neither individual is prepared for the responsibilities of child care and Richard does not have the capacity nor the motivation to learn. The examiner feels if this child is returned to the home, it would not be able to develop to its best capacity and would be badly neglected and perhaps even physically abused."

We also note the testimony of Dr. Bhatia, who had the opportunity to examine Mary McKee. When asked: "Doctor, it's unfortunate that Mrs. McKee has this problem, but it is a fair statement to say that her condition will continue for a prolonged indeterminate period, if not forever?" Dr. Bhatia responded: "Sure, most probably it will be forever." Dr. Bhatia did not express an opinion with regard to Richard McKee because Richard failed to show up for any of the scheduled evaluations.

The rule is well established that when natural parents cannot rehabilitate themselves within a reasonable time after the adjudication hearing, the best interests of the child require that a final disposition be made without delay. *State v. Chant*, 202 Neb. 750, 277 N.W.2d 97 (1979). That, unfortunately, is the situation in this case.

We conclude, therefore, on a de novo review of the record, that the action taken by the separate juvenile court was correct and supported by the evidence, and that its judgment must be affirmed.

AFFIRMED.

CITY OF LINCOLN, NEBRASKA, A MUNICIPAL CORPORATION, APPELLANT, V. NEBRASKA LIQUOR CONTROL COMMISSION ET AL., APPELLEES, JAX, INC., INTERVENOR-APPELLANT.

304 N.W.2d 922

Filed April 24, 1981. No. 43425.

1. **Liquor Licenses.** A liquor license is a purely personal privilege, does not constitute property, and vests no property rights in a licensee which can be transferred.
2. ——. Under the statutes of Nebraska, liquor licenses are issued to a single entity and, when so issued, may not be used by anyone else or transferred to anyone else.
3. **Statutes.** A statute is not to be read as if open to construction as a matter of course. Where the words of a statute are plain, direct, and unambiguous, no interpretation is needed to ascertain the meaning. In the absence of anything to indicate the contrary, words must be given their ordinary meaning. It is not within the province of a court to read a meaning into a statute that is not warranted by legislative language. Neither is it within the province of a court to read anything plain, direct, and unambiguous out of a statute.
4. **Administrative Agencies: Liquor Licenses.** The Nebraska Liquor Control Commission has broad discretion in determining whether applications for licenses should be granted or denied and courts are without authority to interfere with that discretion unless it has been abused.
5. **Administrative Agencies: Appeal and Error.** The courts, in reviewing decisions of the Nebraska Liquor Control Commission, do not exercise independent judgment on fact and policy, but must give due deference to the decisions made by the commission if the same are based upon evidence in the record.
6. **Liquor Licenses.** Absence of need alone is not a sufficient reason to deny an otherwise proper application for a liquor license.

Appeal from the District Court for Lancaster County: HERBERT A. RONIN, Judge. Affirmed.

Dana W. Roper, Assistant City Attorney, for appellant City.

James E. Ryan for intervenor-appellant Jax.

Paul L. Douglas, Attorney General, and Terry R. Schaaf for appellee.

Heard before KRIVOSHA, C.J., MCCOWN, WHITE, and HASTINGS, JJ., and MORAN, District Judge.

KRIVOSHA, C.J.

The appellant, City of Lincoln (City), and the intervenor, Jax, Inc. (Jax), appeal from a judgment entered by the District Court for Lancaster County, Nebraska, finding that the Nebraska Liquor Control Commission did not abuse its authority when, on March 29, 1979, it issued a retail off-sale beer license to one Leonard J. Stransky and Maynard R. Brummer, doing business as "The Pop Shoppe and Beer Stop," pursuant to Neb. Rev. Stat. § 53-131 (Reissue 1978). Jax obtained leave to intervene on the basis that it operated a similar retail establishment some 200 feet from where the new license was to be located. We believe the trial court was correct, and affirm the judgment entered by it.

The record discloses that the Nebraska Liquor Control Commission (the commission), on October 20, 1978, received an application for a beer, off-sale only, license filed on behalf of Leonard J. Stransky and Maynard R. Brummer, a partnership, doing business under the name of "The Pop Shoppe and Beer Stop." The establishment was to be located at 48th and Van Dorn in the city of Lincoln, Nebraska. The application was submitted on a commission form which is used by applicants for all types of liquor licenses, including manufacturers' and wholesalers' liquor licenses, in addition to retail licenses such as the one involved

in this case. City maintains that this was not an application for a new license pursuant to § 53-131, but rather for the transfer of a license previously held by Darrell L. Stanard, and therefore is governed by the provisions of Neb. Rev. Stat. § 53-129 (Reissue 1978) which provides, in effect, that once a license has been granted it may not be relocated without the approval of the local governing body. In the instant case the city council of the city of Lincoln, "the local governing body," denied approval for such transfer. We disagree with the City's position that the application was for a transfer and not for a new license.

In the first instance, the position of both the City and Jax is contrary to our previous holdings. In the case of *City of Lincoln v. Nebraska Liquor Control Commission*, 181 Neb. 277, 147 N.W.2d 803 (1967), we had occasion to review the purpose of § 53-129 and declared that the purpose of this section is to provide a short procedure for a change of location in the business of a liquor licensee when neither the commission nor the municipality involved objects thereto.

The meaning and purpose of § 53-129 becomes clear when we recognize that under the laws of the State of Nebraska a liquor license is issued to a named licensee for a named location. It may not be used by any entity other than that to whom it has been issued, nor may the license be used in any other premises except that which is specifically noted in the license. If, then, a named licensee desires to relocate the license, it may do so under the provisions of § 53-129 by making application to either the commission or the local governing body and, when approved by the local governing body, may move to the new location. In this respect, the relocation of a license from its issued premises to new premises is dependent upon approval by the local governing body. If the local governing body disapproves, then the license may not be relocated. However, this does not mean that another license may not be sought under § 53-131. That was the very issue

in *City of Lincoln v. Nebraska Liquor Control Commission, supra.* There we held that if the licensee to whom the license had previously been issued could not obtain the approval of the local governing body to transfer, it could, nevertheless, make application to the commission for a new license under the provisions of § 53-131. In that instance, the recommendation of the local governing body is only advisory and the commission may issue a license even if the local governing body objects.

But the major difficulty with the argument made by City and Jax, and a difficulty which perhaps arises too often in matters involving liquor licenses, is that the City and Jax characterize this matter as a "transfer." The simple fact of the matter is that there is no statutory authority under Nebraska law to "transfer" a liquor license. We have previously held that a liquor license is a purely personal privilege, does not constitute property, and vests no property rights in a licensee which can be transferred. See *Bali Hai', Inc. v. Nebraska Liquor Control Commission,* 195 Neb. 1, 236 N.W.2d 614 (1975).

Under the statutes of Nebraska, liquor licenses are issued to a single entity and, when so issued, may not be used by anyone else or transferred to anyone else. As we have already indicated, the only "transfer" ever involved with a liquor license is really the "relocation" of the license by the existing licensee.

While the City and Jax argue that the application was originally made for the "transfer" of a license, the record does not legally support that position. It is true that the parties did, on occasion, use the word "transfer." Nevertheless, an examination of the application filed with the commission discloses that the application was filed by Maynard R. Brummer and Leonard J. Stransky, a partnership, doing business as "The Pop Shoppe and Beer Stop." At the time that the application was filed on October 20, 1978, Stransky and Brummer did not have any legal interest or right

in a license previously issued to Stanard and therefore could not have been making application to relocate a license under the provisions of § 53-129.

The provisions of § 53-129 are absolutely clear, and provide in part: "*After such license has been granted for particular premises*, the commission, with the approval of the local governing body, and upon proper showing, may endorse upon the license permission to abandon the premises therein described and remove therefrom to other premises approved by him or it, but in order to obtain such approval *the retail licensee* shall file with the local governing body a request in writing, and a statement under oath which shall show that the premises to which removal is to be made comply in all respects with the requirements of this act. No such removal shall be made by any *such licensee* until his said license has been endorsed to that effect in writing both by the local governing body and by the commission." (Emphasis supplied.) The statute is clear that it applies only to an existing licensee seeking to relocate his license. Neither Stransky nor Brummer, nor "The Pop Shoppe and Beer Stop," are within the meaning of licensee described in § 53-129.

The City and Jax urge us, in effect, to read the statute as though a new licensee may be created under the provisions of § 53-129 by a transfer. The statute, however, is clear and unambiguous and not open to interpretation.

A statute is not to be read as if open to construction as a matter of course. Where the words of a statute are plain, direct, and unambiguous, no interpretation is needed to ascertain the meaning. In the absence of anything to indicate the contrary, words must be given their ordinary meaning. It is not within the province of a court to read a meaning into a statute that is not warranted by legislative language. Neither is it within the province of a court to read anything plain, direct, and unambiguous out of a statute. See,

Ragland v. Norris P. P. Dist., *ante* p. 492, 304 N.W.2d 55 (1981); *O'Neill Production Credit Assn. v. Schnoor*, *ante* p. 105, 302 N.W.2d 376 (1981); *Bachus v. Swanson*, 179 Neb. 1, 136 N.W.2d 189 (1965). It matters not at all what the parties may have believed to be the case nor what the counsel assumed to be the case. A statute cannot be amended by the consent of the parties or by their misunderstanding of the statute.

Having therefore determined that the action involved herein was an application for a new license and not the relocation of an existing license, the applicable statute must be § 53-131 and the approval of the city council was not mandatory to the action of the commission, but only advisory. The only remaining question that we need determine then is whether the granting of the license by the commission was an abuse of discretion.

We have held that the Nebraska Liquor Control Commission has broad discretion in determining whether applications for licenses should be granted or denied and courts are without authority to interfere with that discretion unless it has been abused. See *Harrigfeld v. Nebraska Liquor Control Commission*, 203 Neb. 741, 280 N.W.2d 61 (1979). Moreover, the courts, in reviewing decisions of the Nebraska Liquor Control Commission, do not exercise independent judgment on fact and policy, but must give due deference to the decisions made by the commission if the same are based upon evidence in the record. See *72nd Street Pizza, Inc. v. Nebraska Liquor Control Commission*, 199 Neb. 729, 261 N.W.2d 614 (1978).

City and Jax maintain that the commission abused its discretion in that there is no showing of need and there is evidence that the issuance of the license will create a traffic problem.

Insofar as the matter of need is concerned, we believe we have already addressed that issue in *Joe & Al's IGA, Inc. v. Nebraska Liquor Control Commission*, 203 Neb. 176, 182-83, 277 N.W.2d 693, 697

(1979), wherein we said: "Absence of need alone is not a sufficient reason to deny an otherwise proper application for a liquor license." The reason for such a position is obvious. There are those who would maintain there is never any need for any liquor establishment while others would maintain there are never enough.

With regard to the matter of traffic, the evidence simply does not support the position urged by City and Jax. A member of the Lincoln Police Department testified that the proposed licensed location was already a heavily traveled area. He therefore concluded that the issuance of the license would create even more traffic problems. There was, however, no evidence to support that conclusion. The area involved abuts a main thoroughfare in the city of Lincoln, Nebraska, and is bordered on both sides by minishopping areas. On cross examination he was asked to tell how many cars he thought would be added if the commission saw fit to grant the license. He testified in response to that question, "There would be no way that I could project the increase in traffic." He then attempted to surmise that the existence of the license would cause "crisscrossing" patterns. Yet, there is no evidence to support the conclusion that the crisscrossing patterns would not exist absent the liquor license in view of the fact that both sides of the street are occupied by these minishopping areas. As a matter of fact, the officer conceded that the crisscrossing was already occurring. It is apparent from the record that the area may indeed have a traffic problem, but the record does not reveal that it is one which would in any way be affected significantly by the addition of another liquor license.

Therefore, we cannot say that the commission was in any manner arbitrary in granting the license, and accordingly we are without authority to overrule its action. The trial court properly recognized its limitations by affirming the action of the commission and

we, in turn, must affirm the action of the District Court. The judgment is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. JOHN MEREDITH, APPELLANT.

304 N.W.2d 926

Filed April 24, 1981. No. 43472.

1. **Criminal Attempt: Indictments and Informations.** In the absence of a motion to quash, an information which alleges an attempt to commit an act or acts which if successful would constitute a statutory crime sufficiently charges an attempted crime so as to withstand a jurisdictional attack made for the first time on appeal.
2. **Criminal Law: Statutes.** The defendant has no standing to challenge as vague a portion of the language of a statute which does not apply to his conduct when an unambiguous section of the statute clearly applies to such conduct.

Appeal from the District Court for Douglas County: PAUL J. HICKMAN, Judge. Affirmed.

Thomas M. Kenney, Douglas County Public Defender, Stanley A. Krieger, and Bennett G. Hornstein for appellant.

Paul L. Douglas, Attorney General, and Jerold V. Fennell for appellee.

Heard before KRIVOSHA, C.J., BOSLAUGH, MCCOWN, CLINTON, BRODKEY, WHITE, and HASTINGS, JJ.

WHITE, J.

In this appeal from the District Court for Douglas County, Nebraska, on a conviction of attempted robbery, the defendant was found guilty by a jury and further found to be an habitual criminal. He was sentenced to a term of from 15 to 25 years in the Nebraska Penal and Correctional Complex. The defendant assigns two errors: (1) That the information

against the defendant was fatally defective; and (2) That the statute defining criminal attempt under which the defendant was charged is unconstitutional.

The information charged as follows: The defendant ". . . JOHN MEREDITH late of the County of Douglas aforesaid, in the County of Douglas and State of Nebraska aforesaid, then and there being, did then and there forcibly and by violence, or by putting in fear, attempt to take money from the personal protection of Cynthia M. Karaus, the property of 7-11 Store, with the intent to steal . . . ."

Prior to the adoption of the criminal code revision, there was no general attempt statute in the Nebraska criminal code. Criminal attempt is defined in Neb. Rev. Stat. § 28-201 (Reissue 1979). The case of *State v. Sodders*, *ante* p. 504, 304 N.W.2d 62 (1981), is controlling. We there held: "[I]n the absence of a motion to quash, an information which alleges an attempt to commit an act or acts which if successful would constitute a statutory crime sufficiently charges an attempted crime so as to withstand a jurisdictional attack made for the first time on appeal." *Id.* at 510, 304 N.W.2d at 66.

Defendant's vagueness challenge centers around § 28-201(2), which, as we noted in *Sodders*, may be "inartfully drafted and unduly complex." *Id.* at 507, 304 N.W.2d at 65. However, the conduct of the defendant is clearly proscribed by subsection (1)(a) of § 28-201: "(1) A person shall be guilty of an attempt to commit a crime if he:

"(a) Intentionally engages in conduct which would constitute the crime if the attendant circumstances were as he believes them to be; or

"(b) Intentionally engages in conduct which, under the circumstances as he believes them to be, constitutes a substantial step in a course of conduct intended to culminate in his commission of the crime."

The defendant has no standing to challenge as vague a portion of the language of a statute which

does not apply to his conduct when an unambiguous section of the statute clearly applies to such conduct. *State v. Shiffbauer*, 197 Neb. 805, 251 N.W.2d 359 (1977).

The defendant's contentions are both without merit and the judgment and sentence of the trial court are hereby affirmed.

AFFIRMED.

CLINTON, J., concurs in result.

STATE OF NEBRASKA, APPELLEE, V. WESLEY H. PEERY, APPELLANT.

305 N.W.2d 354

Filed April 24, 1981. No. 43643.

Post Conviction: Motion to Vacate. A motion to vacate a judgment and sentence under the Post Conviction Act cannot be used as a substitute for an appeal or to secure a further review of issues already litigated.

Appeal from the District Court for Lancaster County: DALE E. FAHRNBRUCH, Judge. Affirmed.

Stanley D. Cohen for appellant.

Paul L. Douglas, Attorney General, and Terry R. Schaaf for appellee.

Heard before KRIVOSHA, C.J., BOSLAUGH, MCCOWN, CLINTON, BRODKEY, WHITE, and HASTINGS, JJ.

MCCOWN, J.

The defendant filed a motion for post conviction relief seeking to vacate and set aside a sentence of death on the ground that the judgment was void or voidable under the Constitution of this state or of the United States. The District Court denied defendant's request for an evidentiary hearing, and found that the motion and the files and records of the case show

that the defendant is entitled to no relief, and overruled the motion.

The defendant was found guilty by a jury on two counts, murder in the first degree and robbery. A three-judge sentencing panel sentenced the defendant to death on the murder count and the trial judge sentenced the defendant to a term of not less than 16 nor more than 50 years' imprisonment on the robbery count, the sentences to run consecutively. The convictions and sentences were affirmed on direct appeal to this court in *State v. Peery*, 199 Neb. 656, 261 N.W.2d 95 (1977). Following an unsuccessful attempt to appeal to the Supreme Court of the United States the defendant filed the motion for post conviction relief in this case.

In this post conviction action the defendant essentially contends that the death sentence has been arbitrarily and unconstitutionally imposed in this case and requests that we alter or overrule our holdings in previous death sentence cases. The defendant also contends that *Godfrey v. Georgia*, 446 U.S. 420, 100 S. Ct. 1759, 64 L. Ed. 2d 398 (1980), raises new and additional constitutional issues which are applicable in this case.

We have recently held that the death penalty, when properly imposed, does not violate either the U.S. or Nebraska Constitution. *State v. Anderson and Hochstein*, 207 Neb. 51, 296 N.W.2d 440 (1980). The holding in *Godfrey* is not applicable in this case for the reasons set out in the very recent case of *State v. Harper*, *ante* p. 568, 304 N.W.2d 663 (1981).

The remaining issues and contentions of the defendant have been presented, considered, and determined in the direct appeal of the convictions involved here.

A motion to vacate a judgment and sentence under the Post Conviction Act cannot be used as a substitute for an appeal or to secure a further review of issues already litigated. *State v. Svoboda*, 199 Neb. 452,

259 N.W.2d 609 (1977); *State v. Holtan*, 205 Neb. 314, 287 N.W.2d 671 (1980).

The judgment of the District Court was correct and is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. MARVEL JONES, APPELLANT.

305 N.W.2d 355

Filed April 24, 1981. No. 43664.

1. **Statutes: Words and Phrases.** Unless the context shows otherwise, whenever the word "month" is used in a statute it means a calendar month.
2. **Words and Phrases.** A calendar month is a period terminating with the day of the succeeding month, numerically corresponding to the day of its beginning, less one.
3. **Speedy Trial: Time.** The requirement of Neb. Rev. Stat. § 29-1207 (Reissue 1979) that a defendant be brought to trial within 6 months of the filing of the information refers to 6 calendar months, not 180 days.
4. **Time.** Generally, the period of time within which an act is to be done in any action or proceeding shall be computed by excluding the day of the act, event, or default after which the designated period of time begins to run.
5. **Arrests: Probable Cause.** The test of probable cause for a warrantless arrest is whether at the moment the facts and circumstances within the officers' knowledge and of which they had reasonably trustworthy information were sufficient to warrant a prudent man in believing that the petitioner had committed or was committing an offense.
6. **Search and Seizure: Arrests: Probable Cause.** Knowledge on the part of law enforcement officers of previous law violations of a suspect is a factor to be considered in establishing probable cause for search or arrest for a similar crime.
7. **Confessions.** To be admissible in evidence a confession must be free and voluntary and must not have been extracted by any sort of threat or violence, nor may it have been obtained by any direct or implied promises, however slight, nor by the exertion of any improper influence.

Appeal from the District Court for Lancaster County: SAMUEL VAN PELT, Judge. Affirmed.

Stephen K. Yungblut of Rosenberg & Yungblut for appellant.

Paul L. Douglas, Attorney General, Harold Mosher, and Cheryl Netz for appellee.

Heard before KRIVOSHA, C.J., BOSLAUGH, MCCOWN, CLINTON, BRODKEY, WHITE, and HASTINGS, JJ.

HASTINGS, J.

The defendant, Marvel Jones, appeals from a conviction of first degree sexual assault upon a child. Jones was found guilty by a jury and was sentenced to serve a term of 8 to 12 years in an institution under the jurisdiction of the Department of Correctional Services. The defendant assigns as error that he was not brought to trial within 6 months and therefore was denied his right to a speedy trial. He further assigns as error that his oral and written statements to police officers should have been ruled as inadmissible in that they were not freely and voluntarily given; and that there was no probable cause for the arrest of the defendant at the time of his seizure and therefore the taking of his statement constituted a violation of his fourth amendment rights. We affirm the judgment of the District Court.

The defendant was initially charged in an information filed on July 3, 1979, with the offense of first degree forcible sexual assault. The assault had taken place in the early morning hours of June 15, 1979. The victim, a 14-year-old boy, was walking home that night after visiting a friend and was subjected to forcible oral and anal sexual penetration. The victim described his assailant as a black male, 17 to 19 years of age, 5 feet 9 to 5 feet 10 inches tall, and weighing 140 to 150 pounds. The assailant was clean shaven, had a red bandanna over his head, and his hair was braided in corn rows. After the victim was given a physical examination, he was shown four pictures, including one of the defendant. The victim could not

identify his assailant from one of the pictures. Later on that day the victim was again shown four pictures, including the same picture of the defendant. Again he could not make a positive identification. When asked if any of the men in the pictures had the same build as the assailant, the victim pointed to the picture of the defendant as having a similar build.

On June 16, 1979, shortly before 7 p.m., the defendant was arrested without a warrant and taken to police headquarters for what the police term as investigative purposes. The defendant was advised of his *Miranda* rights and was questioned. He denied any involvement in and knowledge of the sexual assault.

At approximately 8:30 p.m. the same evening the defendant participated in a lineup in which he was positively identified as the assailant by the victim. Later that night the defendant agreed to speak with officers without the aid of or presence of an attorney. He then gave a full written statement of his involvement in the assault and confessed to being the assailant.

The first assignment of error concerns the defendant's right to a speedy trial. The information was filed on July 3, 1979. Neb. Rev. Stat. § 29-1207 (Reissue 1979) requires that a person shall be brought to trial within 6 months of the filing of the information. Subsection (4)(a) and (b) provides, however, that periods of delay resulting from proceedings concerning the defendant, including the filing and pendency of motions to suppress evidence filed by the defendant and continuances requested by or properly chargeable to the defendant, shall be excluded in computing the time for trial. The defendant concedes, and the record supports a conclusion, that the period from July 10, 1979, the date defendant filed two motions to suppress evidence, and July 25, 1979, the date originally set for hearing those motions, a total of 15 days, should be excluded from the computation of the required trial date. Similarly, there is no question

but that November 27, 1979, the date that the defendant filed a motion to suppress a blood test, and the period from November 30, 1979, to December 4, 1979, representing a continuance requested by the defendant, a total in all of 5 days, likewise must be excluded in computing the time for trial. This appears to be a total of 20 days. The State therefore has met its burden of proving by a substantial preponderance of the evidence that at least a 20-day period may be excluded in computing the 6-month trial commencement date. *State v. Johnson*, 201 Neb. 322, 268 N.W.2d 85 (1978).

The defendant was brought to trial commencing on January 21, 1980. Although citing no authority to support his position, the defendant asserts that the statutory 6-month period is in fact 180 days, extended by the 20 days' excluded time to 200 days. Therefore, as January 21, the date the trial commenced, was 202 days from the date of filing the information, the State was 2 days over the statutory limitation.

However, the defendant overlooks the plain words of the statute. The requirement is to bring the defendant to trial within 6 months. In *The People v. Gilbert*, 24 Ill. 2d 201, 181 N.E.2d 167 (1962), an argument similar to that of the defendant's was rejected when the court said that a requirement that a defendant be brought to trial within 4 months is satisfied by trial within 4 calendar months and it need not be had within 120 days. Additionally, unless the context shows otherwise, the word "month" has been legislatively defined to mean calendar month. *Ruan Transport Corp. v. Peake, Inc.*, 163 Neb. 319, 79 N.W.2d 575 (1956); Neb. Rev. Stat. § 49-801(13) (Reissue 1978). Finally, we have construed "calendar month" as being a period terminating with the day of the succeeding month, numerically corresponding to the day of its beginning, less one. *Brown v. City of Omaha*, 179 Neb. 224, 137 N.W.2d 814 (1965). However, we must also consider Neb. Rev. Stat. § 25-2221 (Reissue

1979), which provides in part as follows: "Except as may be otherwise more specifically provided, the period of time within which an act is to be done in any action or proceeding, shall be computed by excluding the day of the act, event, or default after which the designated period of time begins to run." Therefore, excluding the day of the filing of the information, July 3, 1979, the last day which would still fall within 6 months following would be January 3, 1980. Adding the 20 days of exclusions, the final date for commencement of the trial would have been January 23, 1979. There is no question but that the defendant was brought to trial within the period mandated by the statute. We find no merit to the defendant's first assignment of error.

The second assignment of error is that there was not probable cause to arrest the defendant. Neb. Rev. Stat. § 29-404.02 (Reissue 1979) states that a peace officer may arrest a person without a warrant if the officer has reasonable cause to believe that such person has committed a felony. "In Nebraska, the test of probable cause for a warrantless arrest is whether at the moment the facts and circumstances within their (the officers') knowledge and of which they had reasonably trustworthy information were sufficient to warrant a prudent man in believing that the petitioner had committed or was committing an offense." *State v. Tipton*, 206 Neb. 731, 734-35, 294 N.W.2d 869, 872 (1980).

We have also held that knowledge on the part of law enforcement officers of previous law violations of the suspect is a factor to be considered in establishing probable cause for search or arrest for a similar crime. *State v. Booth*, 202 Neb. 692, 276 N.W.2d 673 (1979).

In this case the arresting officers knew that the defendant had been involved in sexual assaults in the past, that the assaults had occurred in the general area of this incident, and that the prior assaults also

involved young men. The victim had indicated that the defendant had a similar build to his assailant, the defendant was known to have worn a bandanna on his head in the past, and that the victim thought someone had called out to his assailant prior to the assault as "Ma" or "Marv." (Defendant's first name is Marvel.) We believe that the combination of these factors gave the officers probable cause to arrest the defendant. Such probable cause was not negated, as the defendant contends, by the inability of the victim to positively identify the defendant from the pictures shown to him. The arrest was lawful.

The defendant next contends that the confession was not given voluntarily and freely. A review of the record shows to the contrary. The defendant was explained his *Miranda* rights three times during the course of the evening, and all three times waived them. After giving the statements he had the opportunity to read and correct any misstatements. To be admissible, a confession must be free and voluntary and must not be extracted by any sort of threat or violence, nor may it be obtained by any direct or implied promises, however slight, nor by the exertion of any improper influence. *State v. Irwin*, 191 Neb. 169, 214 N.W.2d 595 (1974). There is no indication in the record of any threat, violence, promise, or improper influence. The officers took great care to safeguard all of the defendant's constitutional guarantees. Again, we find no error committed by the trial court.

The judgment and sentence of the District Court for Lancaster County are correct and are affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. VIRGIL E. SLIVA, APPELLANT.

305 N.W.2d 10

Filed April 24, 1981. No. 43665.

Sentences. A sentence validly imposed takes effect from the time it is pronounced and a subsequent sentence, fixing a different term, is a nullity.

Appeal from the District Court for Polk County: BRYCE BARTU, Judge. Appeal dismissed.

R. Steven Geshell of Robak & Geshell for appellant.

Paul L. Douglas, Attorney General, and Harold Mosher for appellee.

Heard before KRIVOSHA, C.J., BOSLAUGH, MCCOWN, CLINTON, BRODKEY, WHITE, and HASTINGS, JJ.

KRIVOSHA, C.J.

The appellant, Virgil E. Sliva (Sliva), appeals from an order originally entered by the county court of Polk County, Nebraska, and subsequently affirmed by the District Court for Polk County, Nebraska. For reasons more particularly set out hereinafter, the appeal is dismissed as being untimely.

The record discloses that Sliva was originally charged in the county court of Polk County, Nebraska, under a two-count complaint. Count I charged that on or about the 24th day of November 1979, in the County of Polk, Nebraska, Sliva operated or had in his physical control a motor vehicle while under the influence of alcoholic liquor, in violation of Neb. Rev. Stat. § 39-669.07 (Reissue 1978). Count II of the complaint charged that Sliva had previously been convicted of driving while under the influence of alcoholic liquor on February 13, 1970, and that this, therefore, was his second offense.

At the hearing held on December 20, 1979, Sliva appeared with his attorney, Cleo F. Robak, and

entered a plea of guilty to the charge. He thereafter reappeared before the county court of Polk County, Nebraska, on February 22, 1980, at which time the court, having previously accepted his plea of guilty, sentenced Sliva to serve a sentence of 10 days in the county jail, pay a fine of $500, and have his driver's license revoked for 1 year, during which time he was ordered not to drive. After the sentence was imposed, the court announced that the matter was adjourned.

The record then reflects that sometime later the same day the parties again appeared before the county judge and asked that the sentence be vacated because apparently Sliva, through inadvertence or mistake, did not understand an option that was offered to him by the trial court and which was rejected by him. The offer had to do with his drinking and required him to submit himself to evaluation by the Eppley Center in Omaha, Nebraska. The court acceded to the request of Sliva and set the sentence aside, although the plea of guilty remained.

The record then reflects that on April 25, 1980, Sliva and his attorney, R. Steven Geshell, a partner of Mr. Robak, appeared before the county court of Polk County, Nebraska. At this time the court again sentenced Sliva to pay a fine, serve a jail sentence, and have his license and driving privileges revoked for 1 year. Notice of appeal was filed on April 30, 1980, an appeal bond having already been filed on April 25, 1980. The difficulty with all of this, however, is that the sentence which was originally imposed on February 22, 1980, was a final judgment and one which the trial court was not at liberty to vacate. We recently held in the case of *State v. Cousins*, *ante* p. 245, 247, 302 N.W.2d 731, 732 (1981): "'The rule is that a sentence validly imposed takes effect from the time it is pronounced and that a subsequent sentence fixing a different term is a nullity.'" The rule is not new, having previously been declared by this court in *State v. Snider*, 197 Neb. 317, 248 N.W.2d 342 (1977).

Furthermore, in *State v. Williams*, 194 Neb. 483, 484, 233 N.W.2d 772, 773 (1975), we held: "An order by a District Court purporting to suspend a sentence legally pronounced in a criminal action for the purpose of placing a defendant on probation is a nullity." We perceive of no rule or reason which would distinguish a sentence imposed by a District Court from one imposed by a county court. It must be kept in mind that the court did not grant a new trial for errors occurring at trial, but merely vacated a valid sentence. Sliva was required to perfect his appeal from the county court to the District Court within 10 days from the rendition of the judgment on February 22, 1980. Neb. Rev. Stat. § 24-542 (Reissue 1979). Having failed to do so, his appeal to the District Court was untimely and the District Court was without jurisdiction to review the matter. See *Edward Frank Rozman Co. v. Keillor*, 195 Neb. 587, 239 N.W.2d 779 (1976). The judgment imposed by the county court on February 22, 1980, must, therefore, be reinstated in all respects, including the payment of the fine of $500.

APPEAL DISMISSED.

STATE OF NEBRASKA, APPELLEE, V.
MAGELLAN HUDSON, APPELLANT.
STATE OF NEBRASKA, APPELLEE, V.
FLOYD MAEBERRY, APPELLANT.

305 N.W.2d 359

Filed May 1, 1981. Nos. 43277, 43278.

1. **Criminal Trials: Defense Counsel: Conflict of Interest.** Unless the trial court knows or reasonably should know that a particular conflict of interest between defendants represented by the same counsel in a criminal trial exists, the court need not initiate an inquiry.
2. ____:____:____. Without special circumstances which would create a duty of inquiry, a defendant who raised no objection at trial must

demonstrate that an actual conflict of interest adversely affected his lawyer's performance in order to gain reversal of a conviction.

3. ____: ____: ____. Where the trial court recognizes a divergence between the respective roles played by defendants in an alleged crime, special circumstances then exist which require a voluntary inquiry by the court into a possible conflict of defendants' interests.

4. ____: ____: ____. Where a potential conflict in interest arises, the proper course of action for the trial judge is to conduct a hearing to determine whether a conflict exists to the degree that a defendant may be prevented from receiving advice and assistance sufficient to afford him the quality of representation guaranteed by the sixth amendment.

Appeal from the District Court for Douglas County: JAMES M. MURPHY, Judge. Reversed and remanded for new trial.

Thomas M. Kenney, Douglas County Public Defender, and Bennett G. Hornstein for appellants.

Paul L. Douglas, Attorney General, and Mark D. Starr for appellee.

Heard before KRIVOSHA, C.J., BOSLAUGH, MCCOWN, CLINTON, BRODKEY, WHITE, and HASTINGS, JJ.

WHITE, J.

Defendants Hudson and Maeberry appeal from a judgment of conviction in the District Court for Douglas County, Nebraska, for the crime of first degree sexual assault. Defendant Hudson was sentenced to a term of 1½ to 3 years' imprisonment, and defendant Maeberry to a term of 1 to 2 years' imprisonment with credit for time served prior to trial. Defendants appeal their convictions. We reverse and remand for a new trial.

The evidence established that on September 26, 1979, at about 2 p.m., the prosecutrix was walking from her job to her home on South 27th Street in Omaha, Nebraska. Near 24th and Farnam Streets she was approached by defendant Hudson and asked if she "wanted to party" and "smoke some angel dust." Defendant Maeberry was in a nearby drugstore and joined Hudson and the prosecutrix while they were

talking. It was agreed that all three would go to the prosecutrix's apartment. They did so, with the prosecutrix unlocking the apartment door so they could enter. She did not lock the door from the inside once they were all in the apartment but did notice later that it had been locked. In a pretrial deposition she stated that defendant Hudson locked the door from the inside, but at trial she testified that "the last person in" locked it and that she could not remember which defendant that was.

The apartment contained a living room, dining room, kitchen, bathroom, dressing room-closet combination, and a Murphy bed which pulled down out of the wall into the living room. The prosecutrix supplied the defendants with drinking glasses for wine which defendant Maeberry had brought in, and all three sat down on a couch in the living room. Defendant Hudson then lit a rolled cigarette and passed it to the other parties. He then attempted to kiss the prosecutrix.

The prosecutrix's version of the next-recited incidents are to a large degree contradicted by the testimony of the defendant Maeberry, who was the only defendant to testify at trial.

According to the prosecutrix, Hudson asked her to accompany him into the bathroom to snort some cocaine. As she entered the bathroom, Hudson shut the door and ordered, "Take off your clothes, bitch." The prosecutrix rolled over into the corner of the bathroom and began crying, and Hudson threatened that he would hurt her if she did not keep quiet. He then began to choke her and she lost consciousness. When she regained consciousness, Hudson was removing her slacks. He then took her into the dressing room from the bathroom and forced her to perform fellatio. Next he ordered her to pull down the Murphy bed in the living room and lie on it and Hudson then had vaginal intercourse with her. Defendant Maeberry was on the couch during all these events. After Hudson engaged in intercourse with the prosecutrix on the bed, Mae-

berry disrobed and also engaged in vaginal intercourse with her. Thereafter the defendants forced her to bathe, and each had vaginal intercourse with her after the bath. While Maeberry was engaging in intercourse with her this second time, Hudson again forced her to perform fellatio. Hudson then ransacked the apartment and she later found that a flute, some jewelry, and $100 cash was missing. At no time during the intercourse on the bed did she resist the defendants because she was afraid they would hurt or kill her.

Following the above-described events, defendants then insisted that the prosecutrix accompany them to California to work as a prostitute. As the three were walking down the steps to leave her apartment building, she jumped behind a young man in the hallway and began to cry that she had been raped. Hudson immediately left the building. Maeberry stayed behind to deny to the young man that he had raped the prosecutrix, but left when the young man suggested he do so. The young man then assisted the prosecutrix in telephoning a friend who took her to Lutheran Hospital. Police were summoned. The examination of the prosecutrix at the hospital established that she had engaged in sexual relations and had marks on her throat. Police made an investigation and defendants were subsequently arrested and charged.

Defendant Maeberry's testimony was that, while the prosecutrix and Hudson were in the bathroom, the door was open and that he neither saw nor heard evidence of violence or threats upon the prosecutrix by Hudson. He maintained his belief that all the sexual acts which occurred were consensual, that the prosecutrix had asked defendants if she could go to California with them, and that the personal property was taken in order to get money for her bus ticket. On the way down the steps, according to Maeberry, Hudson then told the prosecutrix she could not accompany them to California and just after that she jumped behind

the young man and began crying that she had been raped.

Defendants assign a number of errors, but we shall discuss only one: Whether the District Court committed reversible error in overruling both defendants' objections to consolidation of their cases for trial.

Defendants were represented by two staff attorneys from the Douglas County Public Defender's office. Each attorney participated actively in the trial and it is apparent that each was representing both defendants. Before trial, counsel for the defendants objected to the State's motion to consolidate the cases for trial, but there is no indication from the record that arguments were heard on the motion or the objection. At no time before, during, or after the trial did counsel ask the trial court that separate counsel working independently of one another be appointed for the defendants, although, under the above-mentioned assignment of error, they argue strenuously in their brief that a conflict of interest existed between the two defendants. We treat the above assignment as one dealing with appointment of separate counsel, and agree with the defendants.

The prosecutrix's testimony showed that the threats and violence which accompanied the sexual penetration, thereby making it a forcible assault, were all made or perpetrated by defendant Hudson out of Maeberry's presence. It is defense counsel's argument on appeal that the jury could have found Maeberry innocent of any knowledge of threats or violence accompanying the incidents, and thus innocent of forcible penetration. However, defense counsel now argue that, in order to maintain a full defense of consent for both defendants, it was necessary for them to ignore elements of the prosecutrix's testimony which could have helped Maeberry to the detriment of Hudson. They argue that they could have impeached her more vigorously on the disparity of her deposition and trial statements as to who locked the apartment

door from the inside in order to exonerate Maeberry had it not been so perilous to Hudson's consent defense. Also, the prosecutrix testified that, while the threats and violence were occurring in the bathroom, the door from that room to the living room was closed. Maeberry testified that it was open and that he heard no threats or violence. It would have been to Maeberry's advantage, but not Hudson's, if counsel could have stressed that the bathroom door was closed and that Maeberry had no knowledge of the threats and violence undertaken by Hudson. Counsel argue that they were forced to forego this opportunity to rehabilitate Maeberry at the expense of Hudson in order to protect Hudson's interests.

We agree that there was a conflict between the interests of the defendants at trial which called for separate representation. However, defense counsel never brought the issue to the trial court's attention. The question for decision then becomes: If defense counsel do not raise the conflict issue at trial, is the trial court under a duty in a multiple representation case to initiate any inquiry along those lines on its own motion?

The most recent statement of the U.S. Supreme Court on this question appears in *Cuyler v. Sullivan*, 446 U.S. 335, 100 S. Ct. 1708, 64 L. Ed. 2d 333 (1980). In *Cuyler*, three defendants, all charged with the murder of two people, were represented by two attorneys at separate trials. Sullivan was convicted after resting his defense at the end of the state's case. The other two defendants were subsequently acquitted at their trials. During none of the trials did any defendant suggest to the court that a possible conflict of interest existed which would prohibit multiple representation. The Supreme Court held that "[u]nless the trial court knows or reasonably should know that a particular conflict exists, the court need not initiate an inquiry." The court went on to hold that, without special circumstances which would create a

duty of inquiry, "a defendant who raised no objection at trial must demonstrate that an actual conflict of interest adversely affected his lawyer's performance" in order to gain reversal of a conviction. *Cuyler* at 347-48.

The record in the present case does not demonstrate that defense counsel ever raised the conflict issue with the trial court. Thus, we must decide whether "special circumstances" existed which should have alerted the trial court to a possibility of a conflict arising between the interests of the defendants.

In finding that no special circumstances existed in *Cuyler* which would have put the trial court on notice of a possible conflict, Mr. Justice Powell noted that there were separate trials; no objections were made to the multiple representation; that defense counsel's "opening argument . . . outlined a defense compatible with the view that none of the defendants was connected with the murders"; and that defense counsel's decision to rest at the end of the state's case was a legitimate trial tactic based on the weakness of the state's case against Sullivan and not a red flag to the trial court of a possibility of conflict. *Cuyler* at 347.

In the present case, the record shows only an objection to the State's motion to consolidate, without more. Nothing in the record indicates that the possibility of conflicting interests was brought to the trial court's attention by defense counsel. At a pretrial hearing on another matter, the following colloquy between the court and defense counsel took place: "THE COURT: I would assume that — and I'm only assuming because no one's made it a matter of record yet — that consent is a defense in this?

"MR. FRANK [defense counsel]: Yes, Your Honor.

"THE COURT: All right.

"MR. SIGLER [State's attorney]: And that's as to both?

"MR. FRANK: Yes. . . ."

Counsel made no mention of conflict either in this hearing or in any of the in camera hearings during the course of the trial. Defense counsel's treatment of trial testimony referred to above, both as to the prosecutrix's testimony and to Maeberry's, would not of itself rise to the level of "special circumstances" sufficient to impose a duty of inquiry on the trial court as to conflict, since both represent legitimate trial tactics based on a mutual defense of consent.

However, after the jury was instructed, retired, and began deliberating, the trial court requested it to stop its deliberation and return to the courtroom for further instruction. At that time the court gave an aider and abettor instruction, even though it had earlier informed all counsel that it would not honor the State's request to give that instruction. The instruction emphasized the difference between the respective roles played by Hudson and by Maeberry in the alleged assault, and the resulting peril of their being represented by the same counsel.

The *Cuyler* opinion places significant emphasis on the fact that there were separate trials for the codefendants in finding that no special circumstances existed. "The provision of separate trials for Sullivan and his codefendants significantly reduced the potential for a divergence in their interests." *Cuyler* at 347. In the present case, however, the trial was consolidated and, in fact, the court specifically denied a defense request for separate trials. While an objection to consolidation, without more, does not of itself bring about the requirement of an inquiry into conflict, we think that it should place the trial court slightly more on its guard to inquire when divergence between the defendants' interests becomes apparent as it did here when the trial court recalled the jury to give the aider and abettor instruction. Although the primary responsibility of watching for conflict remains on the bar, the trial court must still be "watchful for indicia of conflict during the trial." *United States v. Mandell*, 525 F.2d

671, 677 (7th Cir. 1975).

As noted in *United States v. Carrigan*, 543 F.2d 1053, 1055 (2nd Cir. 1976): "When a potential conflict of interest arises . . . the proper course of action for the trial judge is to conduct a hearing to determine whether a conflict exists to the degree that a defendant may be prevented from receiving advice and assistance sufficient to afford him the quality of representation guaranteed by the Sixth Amendment." In light of *Cuyler*, this hearing must take place when the requisite "special circumstances" arise. At the time, then, when the trial court in the present case gave the aider and abettor instruction, it should have held this type of hearing since it apparently had recognized a divergence in the respective levels of participation in the alleged assault of each defendant, indicating a possible conflict in their interests. See *Wood v. Georgia*, 49 U.S.L.W. 4218, decided March 4, 1981. Since this hearing was not held, we reverse and remand for a new trial.

REVERSED AND REMANDED FOR NEW TRIAL.

CLINTON, J., dissents.

BOSLAUGH, J., dissenting in part.

I am unable to discern how the defendant Hudson was prejudiced by the joint trial. I would affirm the judgment as to Hudson.

HASTINGS, J., joins in this dissent.

GLEN R. MILLER, APPELLANT, V. HARRY PETERSON, DIRECTOR OF THE DEPARTMENT OF MOTOR VEHICLES, APPELLEE.

305 N.W.2d 364

Filed May 1, 1981. No. 43320.

1. **Motor Vehicles: Licenses: Pleas.** Whenever a guilty plea is utilized to support a judgment of conviction used to support an order revoking a motor vehicle operator's license under Neb. Rev. Stat. § 39-669.27 (Reissue 1978), and it is challenged in District Court, it must appear from the record that there was a judicial acceptance of that plea.
2. **Statutes.** It is a fundamental rule of construction that in construing statutes this court will, if possible, try to avoid a construction which leads to absurd, unjust, or unconscionable results.
3. ——. A sensible construction will be placed upon a statute to effectuate the object of the legislation rather than a literal meaning that would have the effect of defeating the legislative intent. In order to determine this intent the reasons for the enactment of the statute and the purposes and objects of an act, as obtained from an examination of the legislative history, may be used as guides in an attempt to give effect to the main intent of lawmakers.
4. **Motor Vehicles: Judges: Jurisdiction.** By creating a classification of "traffic infractions" by Neb. Rev. Stat. § 39-602(107) (Cum. Supp. 1980), it was not the intention of the Legislature to deprive the nonlawyer associate judges of jurisdiction over this particular classification of offenses.
5. **Motor Vehicles: Words and Phrases: Judges.** "Traffic infractions" are misdemeanors for the purpose of determining the authority of nonlawyer associate judges under the provisions of Neb. Rev. Stat. § 24-519 (Reissue 1979).

Appeal from the District Court for Scotts Bluff County: ALFRED J. KORTUM, Judge. Reversed.

Steven C. Smith of Van Steenberg, Brower, Chaloupka, Mullin & Holyoke for appellant.

Paul L. Douglas, Attorney General, and Ruth Anne E. Galter for appellee.

Heard before KRIVOSHA, C.J., WHITE, and HASTINGS, JJ., and VAN PELT and CAPORALE, District Judges.

HASTINGS, J.

Plaintiff, Glen R. Miller, appealed to the District

Court from an order of Harry Peterson, director of the Department of Motor Vehicles for the State of Nebraska, defendant, who had revoked Miller's motor vehicle operator's license pursuant to the so-called point system, Neb. Rev. Stat. § 39-669.27 (Reissue 1978). The District Court affirmed the action of the director, and Miller has appealed to this court. We reverse.

One of the convictions utilized to assess the requisite 12 points was one dated November 17, 1978, out of the county court of Hamilton County. The transcript from the Department of Motor Vehicles contains an abstract of judgment obviously describing that case and certified to by the clerk of the county court. The record made in District Court contains a certified copy of the actual docket sheet. That sheet is filled out completely except that there is no signature by a judge. The record also contains a "waiver and plea of guilty" signed by Miller. We were presented with the same situation in *Hyland v. State*, 194 Neb. 737, 235 N.W.2d 236 (1975), and were forced to reject the director's reasoning. "We find no authority to support that position [that a waiver of appearance and plea of guilty signed by the person charged should be treated as a 'judgment of conviction'] where there is no acceptance of the guilty plea and no record of a conviction or judgment of conviction by the court." *Id.* at 740, 235 N.W.2d at 238. If in fact the plea was accepted and Miller judicially found guilty, but the judge simply neglected to affix his signature, that omission can readily be cured. If the "waiver and plea" actually has not been acted upon by a judge, it can properly be presented at this time.

Miller objects to two other speeding convictions as being void because they were entered by nonlawyer associate judges. His reasoning is that the trial authority of such judges is limited by Neb. Rev. Stat. § 24-519 (Reissue 1979) to "[a]ny civil proceeding when the amount . . . claimed does not exceed one

thousand dollars; . . . [a]ny proceeding based on violation of a city or village ordinance; [or] . . . [a]ny criminal proceeding which is a misdemeanor under the laws of this state." After the effective date of that statute, the Legislature enacted what has now been codified as Neb. Rev. Stat. § 39-602(107) (Cum. Supp. 1980). This legislation, Miller argues, creates an additional offense category called a "traffic infraction," which includes the violation of any of the Nebraska Rules of the Road "or of any law, ordinance, order, rule, or regulation regulating traffic which is not otherwise declared to be a misdemeanor or a felony and which shall be a civil offense."

Miller insists that the powers of nonlawyer associate judges, like judges themselves, extend and are limited to those fixed by law, beyond which they cannot act. He concludes, then, that there being no statutory authority for the nonlawyer judges to hear traffic cases, his two convictions were void and cannot form the basis for a point assessment.

Section 24-519 is a part of L.B. 1032 enacted in 1972, and § 39-602(107) finds its origin in L.B. 45, effective in 1973. Section 24-519 authorizes, and continues to authorize, a nonlawyer associate judge to enter judgments in civil cases involving damages of up to $1,000 and to impose criminal sentences of imprisonment for 1 year and fines of $1,000. Neb. Rev. Stat. § 28-106 (Reissue 1979). It makes absolutely no sense for the Legislature to 1 year later forbid these same judges to hear infractions of a civil nature in which the maximum fine ranges from $100 to $300. Neb. Rev. Stat. § 39-6,112 (Reissue 1978).

"It is a fundamental rule of construction that in construing statutes this court will if possible try to avoid a construction which leads to absurd, unjust, or unconscionable results." *State v. Goham*, 191 Neb. 639, 641, 216 N.W.2d 869, 871 (1974). A sensible construction will be placed upon a statute to effectuate the object of the legislation rather than a literal

meaning that would have the effect of defeating the legislative intent. In order to determine this intent the reasons for the enactment of the statute and the purposes and objects of an act as obtained from an examination of the legislative history may be used as guides in an attempt to give effect to the main intent of lawmakers. *PPG Industries Canada Ltd. v. Kreuscher*, 204 Neb. 220, 281 N.W.2d 762 (1979).

The Nebraska Rules of the Road, Neb. Rev. Stat. §§ 39-601 et seq. (Reissue 1978), was the result of a comprehensive revision of motor vehicle traffic laws as expressed by Neb. Laws 1973, L.B. 45, and for the most part was based upon the Uniform Vehicle Code prepared by the National Committee on Uniform Traffic Laws and Ordinances (Rev. 1968). Committee on Public Works, Eighty-third Legislature, Minutes of January 18, 1973, Hearing at 17-20. The notable deviation has to do with the penalty provisions. The uniform code for the most part classifies traffic offenses as misdemeanors and provides for penalties of not more than 10 days in jail or a fine of $100, with a corresponding increase for the second and third convictions within the same year. Uniform Vehicle Code § 17-101. The Nebraska Rules of the Road, as previously mentioned, classify these offenses as "traffic infractions" and, although failing to grant authority for jail sentences, follow the system of progressive fines found in the uniform code. The creation of the offense of "traffic infraction" is explained in the minutes of the Public Works Committee previously cited, beginning at 21: "SENATOR WARNER: Would some penalties for infractions be less now as a general rule? MR. NELSON: In terms of a maximum, this is true. There have been some changes because of the United States Supreme Court decision requiring counsel where there is a possible jail. [sic] Now the experience over the country, and this is verified in Lincoln or Omaha, Nebraska, is that for that type of offense jail has not been used, but

there would be a requirement for counsel to be appointed and this type of thing. As a consequence, there has been a definition in here of the term 'infraction' which does not include any jail sentence, but it does include some heavier penalties in terms of fines, as opposed, for example, to the term 'misdemeanor' which will include a jail sentence or possible jail sentence." It would therefore seem that it was never the intention of the Legislature to deprive the nonlawyer associate judges of jurisdiction over this particular classification of offenses. Rather, it was intended simply as a limitation on the penalties to be imposed in a category of cases which formerly had been called misdemeanors.

Another answer to Miller's claim may be found in *State v. Karel*, 204 Neb. 573, 284 N.W.2d 12 (1979); *State v. Huffman*, 202 Neb. 434, 275 N.W.2d 838 (1979); and *State v. Knoles*, 199 Neb. 211, 256 N.W.2d 873 (1977). In all of these cases we held, under different circumstances, that a "traffic infraction" was a criminal offense and that the prosecution of such action is a criminal proceeding.

We therefore hold that a nonlawyer associate judge of the county court is authorized to preside in any proceeding involving a "traffic infraction" as defined by § 39-602(107), and Miller's assignment of error in that regard has no merit.

However, because of the deficiency in the November 17, 1978, conviction in the county court of Hamilton County, relied upon by the director, the District Court should have vacated and set aside his order revoking Miller's license. Therefore, the judgment of the District Court is reversed and the order complained of is vacated and set aside.

REVERSED.

SCHOOL DISTRICT NO. 20, COUNTY OF DAWSON, APPELLANT, V. COMMISSIONER OF LABOR, APPELLANT, AND HOWELL G. OLDHAM, APPELLEE.

305 N.W.2d 367

Filed May 1, 1981. No. 43354.

1. **Employment Security Law: Words and Phrases.** An employee who desires to retain his employment but resigns or quits because the employer has clearly indicated that if he does not his employment will be terminated has not left his employment "voluntarily," as that term is used in Neb. Rev. Stat. § 48-628(a) (Reissue 1978).
2. **Employment Security Law: Attorney Fees.** Neb. Rev. Stat. § 48-646 (Reissue 1978) requires that the amount of attorney fees charged by a lawyer to his client be approved by the Commissioner of Labor. It does not authorize the District Court to award attorney fees for which approval by the commissioner has not been sought.

Appeal from the District Court for Dawson County: KEITH WINDRUM, Judge. Affirmed in part, and in part reversed.

James B. Gessford of Perry, Perry, Witthoff & Guthery for appellant school.

Paul L. Douglas, Attorney General, and Jerold V. Fennell for appellant Commissioner.

Richard G. Kopf of Cook & Kopf, P.C., for appellee.

Heard before KRIVOSHA, C.J., BOSLAUGH, MCCOWN, CLINTON, BRODKEY, WHITE, and HASTINGS, JJ.

CLINTON, J.

Defendant Dr. Howell G. Oldham (Oldham) applied for and was awarded unemployment compensation benefits under the Employment Security Law. Upon redetermination, a Department of Labor claims deputy found that Oldham was disqualified from receiving benefits for 7 weeks, under Neb. Rev. Stat. § 48-628(a) (Reissue 1978), because he resigned his employment "voluntarily . . . without good cause." Oldham appealed to the appeal tribunal. Following a

hearing, the appeal tribunal found that Oldham did not leave his employment voluntarily, but was discharged. The plaintiff, School District No. 20, County of Dawson (the Gothenburg Public School District), and the defendant Commissioner of Labor (Commissioner) appealed to the District Court for Dawson County, which affirmed and awarded Oldham attorney fees for the appeal. The Gothenburg Public School District appeals to this court, assigning as error the finding that Oldham resigned involuntarily or with good cause, and arguing that upon de novo review this court should find to the contrary. The Commissioner appeals solely on the issue that the District Court wrongly awarded Oldham attorney fees without statutory authority to do so. We affirm in part and reverse in part.

An appeal under the Employment Security Law, Neb. Rev. Stat. §§ 48-601 to 48-669 (Reissue 1978), must be heard by the District Court de novo on the record, although either party may offer additional evidence after proper notice. On appeal this court must also consider the cause de novo on the record. *Powers v. Chizek*, 204 Neb. 759, 285 N.W.2d 501 (1979); *Glionna v. Chizek*, 204 Neb. 37, 281 N.W.2d 220 (1979).

For 10 years Oldham served as superintendent of the Gothenburg Public School District. Each year in March or April the school board voted on whether to reelect the district administrators, including the superintendent, for the coming year. Reelection required an "aye" vote by at least three school board members, assuming all six were present and voting.

On February 12, 1979, Oldham and all six members of the school board attended a regularly scheduled school board meeting. After the public portion of the meeting, the school board went into executive session. During this session, France, the school board president, dismissed everyone from the room except Oldham and the school board members and initiated a conversation.

Although the testimony as to the precise language used in the conversation is slightly conflicting, there is no doubt of its substance and import. Oldham testified that France told him: "'Dr. Oldham, I feel I should inform you it is extremely doubtful that you would get a majority vote for reelection for Superintendent of Schools for the coming year.'" France and Buddenberg, a school board member present at the meeting, testified that it was to the effect that Oldham possibly or probably would not receive a majority vote for reelection as superintendent. Oldham told the school board he would like to remain superintendent for another year so that, upon reaching age 55, he could sell his home in Gothenburg with more favorable tax consequences and his son could graduate from the Gothenburg High School. The other witnesses agreed that Oldham told the school board he would like to remain for another year so that his son could graduate from Gothenburg High School. At this point, according to France, Oldham, and Buddenberg, Buddenberg asked something to the effect that: "You have all heard Dr. Oldham. Because of [his son] would you change your [mind] and let him stay another year?" No one responded. Oldham testified that he then said: "'Leonard [France], if that is the feeling of the Board, I suppose we can handle it in my office tomorrow.'" According to France and Buddenberg, Oldham offered to resign provided France would give a letter saying that it was possible he would not be reelected.

Oldham testified that he believed he had been discharged by the school board during the February 12, 1979, meeting. This belief was based in part on his experience with the school board which led him to think that they discussed his reelection before the meeting. He testified that when he had asked the school board on a couple of prior occasions whether they had discussed a particular issue he was told: "'Yes, down at the post office.'" France denied any attempt to force Oldham's resignation, saying that he intended

solely to give Oldham the opportunity to resign rather than be publicly voted out later. According to France, he took this step without consulting other board members because two school board members approached him before February 12th and told him that they would not vote for Oldham's reelection.

After the meeting, according to France's own testimony, he called Kelley Baker, attorney for the state school board, and asked whether any legal problems would result if he furnished Oldham with the above-mentioned letter. Baker responded in the negative, saying that school boards could fire superintendents at any time under state law.

The next afternoon France and Oldham met in the latter's office. Oldham presented France with a letter stating, in part: "It appears doubtful that you will secure a majority vote to be re-elected to your position as Superintendent of the Gothenburg Schools for another term.

"Sincerely,
/s/ Leonard France
Leonard France, President
Gothenburg Board of Education"

France signed the letter and, according to Oldham, remarked: "'I guess that represents the feeling of the Board of Education.'" France testified that he signed the letter only on behalf of himself and not upon authorization by the school board. Oldham then gave France a letter of resignation which said, in part: "[A]s per our verbal conversation last night at the Board meeting, I feel it to be in my best interest to inform you of my resignation."

The school board accepted Oldham's resignation on April 9, 1979.

Section 48-628(a) provides, in part, that: "An individual shall be disqualified for benefits:

"(a) For the week in which he has left work voluntarily without good cause, if so found by the Commissioner of Labor, and for not less than seven

weeks nor more than ten weeks which immediately follow such week, as determined by the commissioner according to the circumstances in each case."

In construing this language we have said: "[T]o 'leave work voluntarily,' . . . means to intentionally sever the employment relationship with the intent not to return to, or to intentionally terminate, the employment." *Powers v. Chizek*, 204 Neb. 759, 764, 285 N.W.2d 501, 504 (1979). *MacFarland, Aplnt., v. Unemploy. Comp. Bd.*, 158 Pa. Super. 418, 45 A.2d 423 (1946), which was cited in *Powers*, defined "voluntary" as meaning an employee who left of his own volition and was not discharged. A similar definition, also quoted in *Powers*, was that "voluntary" means that the claimant, by his or her own choice, intentionally, of his or her own free will, terminates the employment. *Allen v. Core Target City Y. Prog.*, 275 Md. 69, 338 A.2d 237 (1975). See, also, 76 Am. Jur. 2d *Unemployment Compensation* § 59 at 956 (1975).

Powers dealt with the question of whether an employee discharged for failing to appear for work, in the belief that she had already been fired, terminated her employment voluntarily. In *Powers* the question arose because it was unclear whether the employee intended and acted to terminate her employment; in this case the question of voluntariness arises because it is unclear whether the employer intended and acted to terminate the employment relationship or, in other words, to discharge the employee.

Upon de novo review we hold that the District Court correctly found that Oldham did not terminate his employment voluntarily. The record shows that France, not Oldham, first raised the issue of Oldham's reelection. Likewise, it is undisputed that Oldham desired to remain in his position as superintendent for at least another year, and told the school board of his desire. When Buddenberg asked the school board members whether they would change their minds and let Oldham stay for one more year, no one encouraged

him to remain. It was only after this exchange that resignation was mentioned. The record is devoid of any evidence showing that Oldham had expressed a desire to resign prior to this discussion or that there was any question of misconduct, on his part, involved. It is clear that he resigned only because the school board members who had the power to reelect him intended not to do so.

Since we find that Oldham did not terminate his employment voluntarily, we need not reach the issue of whether he had "good cause" under § 48-628(a) for his actions.

Next, we turn to the issue of attorney fees. The first mention of attorney fees in this record was at the District Court level where both Oldham and the Gothenburg Public School District sought an award of attorney fees for the appeal. The court ordered the Commissioner to pay Oldham reasonable attorney fees. The Commissioner argues that the court lacked statutory authority to do so.

This court has said many times that an award of attorney fees is erroneous unless permitted by statute or uniform practice. *Suhr v. City of Seward*, 201 Neb. 51, 266 N.W.2d 190 (1978); *Warren v. Warren*, 181 Neb. 436, 149 N.W.2d 44 (1967). Neither statute nor uniform practice permits the District Court upon appeal to order an adverse party to pay attorney fees incurred by an unemployment compensation claimant.

Oldham suggests that § 48-646 authorizes such an award. That section provides, in part, that: "Any individual claiming benefits in any proceeding before the commissioner or an appeal tribunal or his or its representative or a court may be represented by counsel or other duly authorized agent, and such counsel may either charge or receive for such services a reasonable fee to be approved by the commissioner. The commissioner may, in special cases, pay such fee from the Employment Security Administration

Fund. Any person who violates any provision of this section shall be guilty of a Class II misdemeanor."

In construing a statute, we have consistently held that the language used by the Legislature should be considered to determine its intent and the words used should be given their plain meaning. *Weiss v. Union Ins. Co.*, 202 Neb. 469, 276 N.W.2d 88 (1979); *PPG Industries Canada Ltd. v. Kreuscher*, 204 Neb. 220, 281 N.W.2d 762 (1979). In plain language, § 48-646 deals with the fees charged to a claimant by his own attorney, approval of such fees by the Commissioner, and payment of fees in special cases by the Commissioner. It plainly provides that the amount of any fee charged to the client by his attorney requires approval by the Commissioner, including any fee for services in any court. The record does not show that any request was ever made to the Commissioner for approval of fees charged. Consequently, there is no showing of any special circumstances which would require payment by the Commissioner from the Employment Security Administration Fund. This statute in no way provides for an award of attorney fees by the District Court where such award was first sought on appeal by the parties and there was no issue on the appeal concerning any determination by the Commissioner as to the reasonableness of fees assessed a claimant by his own attorney or the eligibility of a claimant to have his attorney fees paid by the Commissioner under § 48-646.

We affirm the finding of the District Court that Oldham did not terminate his employment voluntarily, and reverse on the issue of attorney fees.

AFFIRMED IN PART, AND IN PART REVERSED.

McCOWN, J., concurring in part, and in part dissenting.

I concur with that part of the majority opinion which holds that the claimant did not terminate his employment voluntarily. I dissent from that portion of

the opinion disallowing the payment of a reasonable attorney fee to the defendant-claimant for the services of his attorney in the District Court.

It is clear that Neb. Rev. Stat. § 48-646 (Reissue 1978) authorizes the Commissioner of Labor to pay a reasonable attorney fee from the Employment Security Administration Fund "in special cases." That provision is disjunctive from that portion of the statute requiring that any attorney fee charged to a claimant must be approved by the Commissioner.

Where the Commissioner of Labor appeals to the courts from an award of the appeal tribunal in favor of an unemployed claimant, unless there is some provision for the payment of reasonable attorney fees for claimants, the claimants will, in all probability, have extreme difficulty in obtaining the services of counsel to protect their awards. To require a claimant to request the Commissioner of Labor to allow a reasonable attorney fee in an appeal to the courts and have the request approved or denied before entering an appearance rather than to request it in an answer filed in the District Court exalts form over substance.

In this case it is clear that the attorney fees involved are only the fees for services in the District Court, and it is clear that the claimant prayed for such fees in his answer. It is also undisputed that the Commissioner of Labor has resisted, and still resists, the allowance of any fee for the claimant's attorney, either in the District Court or in this court. There can be no reasonable doubt that the Commissioner has denied the payment of any attorney fee out of the Employment Security Administration Fund.

Unless a decision by the Commissioner of Labor denying a request for the payment of attorney fees from the Employment Security Administration Fund is unreviewable by the courts, it should be reviewed in this case because the Commissioner of Labor has denied the payment of attorney fees from the fund and even appealed to this court on the ground that such

fees are not allowable. It cannot be expected that he will reverse that decision, and his exercise of discretion ought to be reviewed now rather than later or not at all.

Where the Commissioner of Labor appeals to the courts from an award of the appeal tribunal to an unemployed claimant and loses the appeal, if there is any case which could be said to be a "special case" this one would be it.

If the majority opinion holds that under the statute a court cannot set or determine a reasonable attorney fee for services of an attorney in its own court without the prior approval of the Commissioner of Labor, I cannot believe the authority of the courts is so limited.

It is unconscionable to require a successful unemployment compensation claimant to defend his award in the District Court against an appeal by the Commissioner of Labor without an allowance of attorney fees, particularly when the appeal is unsuccessful and the Commissioner of Labor has the power to allow a reasonable attorney fee in "special cases." If the statute must be so interpreted, at least the Legislature's attention should be called to the obvious injustice.

The District Court obviously found that this case was a "special case" and quite properly awarded a reasonable attorney fee of $700. That judgment was eminently correct and should be affirmed. I would also order the payment of an additional $700 fee for services of the claimant's attorney in this court.

DIANE L. SOUKUP, APPELLEE, V. GLEN SOUKUP, APPELLANT.

305 N.W.2d 372

Filed May 1, 1981. No. 43361.

1. **Child Custody: Appeal and Error.** The determination of the trial court with respect to changing the custody of minor children will not ordinarily be disturbed unless there is a clear abuse of discretion or it is clearly against the weight of the evidence.
2. **Child Support.** A decree fixing child support payments is not subject to modification in the absence of a material change in circumstances occurring subsequent to the entry of the decree requiring modifications in the best interests of the children.
3. ____. In determining whether a modification of child support is warranted, the circumstances of the parents as well as those of the children must be considered.

Appeal from the District Court for Lancaster County: DONALD E. ENDACOTT, Judge. Affirmed as modified.

Duane L. Nelson for appellant.

Badami & Radke for appellee.

Heard before BOSLAUGH, MCCOWN, CLINTON, BRODKEY, and WHITE, JJ.

MCCOWN, J.

This is a proceeding for modification of a decree of dissolution of marriage as to custody and child support. The District Court denied the husband's application for change of custody of the minor child and granted the wife's request for removal of certain conditions imposed in the decree and also an increase in child support. The husband has appealed.

On December 2, 1976, the marriage of the parties was dissolved. The decree placed the care, custody, and control of Nicholle, the minor child, born January 15, 1971, in the wife, subject to reasonable visitation by the husband, and subject to the following conditions: (a) The juvenile probation department was to strictly supervise the custody and have the right to visit the home at all reasonable times; (b) When the wife was not present the

minor child was to be under adult supervision; and (c) There were not to be any adult male visitors in the home after 11 p.m. if the minor child was on the premises. The decree also awarded the wife $175 per month for support of the minor child.

Following the entry of the decree the juvenile probation department supervised the custody of the minor child and visited the home as provided in the decree. In July 1977 the wife remarried, and thereafter the wife and her present husband and the minor child lived together and the juvenile probation department continued to supervise the custody of the minor child and continued to visit the home.

On December 13, 1978, the wife filed an application to modify the decree by removing the three specific conditions. The application alleged the remarriage of the wife and that that remarriage had made the third condition inapplicable and had also removed any necessity for the other conditions. The former husband filed a response resisting the wife's motion and also sought modification of the decree by changing custody of the minor child from the wife to the husband and eliminating the provision for child support. The wife filed her response to the husband's motion to change custody, denying the husband's allegations and seeking to increase the amount of child support.

In late January and early February 1980 hearings were held on the respective motions, applications, and responses. The evidence of the juvenile probation officers who had supervised the custody of the minor child was that the wife was a fit and proper person to have custody, that the child was being properly cared for, and the home was suitable and proper. In October 1978 the juvenile probation department recommended that supervision be terminated and the wife's application to terminate the conditions followed.

The former husband and his brother-in-law testified that through continued surveillance by them of the wife and her current husband they had observed him

leaving the home on several occasions after 11 p.m., although there was no evidence that the minor child was in the home at the time. There was an attempt to introduce evidence as to the wife's conduct prior to the entry of the original decree, which the court quite properly excluded.

The husband also attempted to establish that the wife's conduct at home created an unsatisfactory atmosphere for the child. Much of the evidence tendered was inadmissible, objected to, and properly excluded.

On February 5, 1980, the trial court entered its order modifying paragraph 2 of the decree of dissolution by deleting subparagraphs a, b, and c; found that the wife was a fit and proper parent and that care, custody, and control of the minor child should remain with her, subject to reasonable rights of visitation by the husband; and ordered that child support payments be increased from $175 to $225 per month. The District Court taxed the costs of the action to the husband and directed that the parties should pay their own attorney fees. The husband has appealed.

The husband contends that the District Court erred in refusing to change the custody of the minor child from the wife to the husband. A decree fixing custody of minor children will not be modified unless there has been a change in circumstances indicating that the person having custody is unfit for that purpose or that the best interests of the children require such action. The determination of the trial court with respect to changing the custody of minor children will not ordinarily be disturbed unless there is a clear abuse of discretion or it is clearly against the weight of the evidence. *Murdoch v. Murdoch*, 206 Neb. 327, 292 N.W.2d 795 (1980); *Kringel v. Kringel*, 207 Neb. 241, 298 N.W.2d 150 (1980).

In the determination of custody and visitation matters the principal concern is the best interests of the children. On the evidence in this record there can be little

doubt that the evidence fully supports the action of the trial court in deleting the former conditions as to custody and in refusing to change the custody of the minor child. There was no abuse of discretion in that regard.

The husband also contends that the evidence was wholly insufficient to establish a substantial change in financial circumstances of the parties since the date of the original decree of dissolution sufficient to warrant an increase in child support. This court has consistently held that a decree fixing child support payments is not subject to modification in the absence of a material change in circumstances occurring subsequent to the entry of the decree requiring modifications in the best interests of the children. *White v. White*, 202 Neb. 199, 274 N.W.2d 546 (1979). In determining whether a modification of child support is warranted, the circumstances of the parents as well as those of the children must be considered. *Bruckner v. Bruckner*, 201 Neb. 774, 272 N.W.2d 270 (1978).

The only evidence offered in the present case tends to establish that neither the husband nor the wife has experienced a substantial change in financial circumstances since the date of entry of the original decree. To the extent there has been a change in circumstances, the husband's financial position and income is somewhat less than it was at the time of the decree and the wife's income and financial resources are greater than they were at the time of the original decree. The only fact which could arguably support an increase in child support was the acknowledged fact of inflation. Inflation operates equally upon the husband, the wife, and the child. The evidence in this case is insufficient to establish materially changed circumstances requiring an increase in child support.

That portion of the decree of the District Court which deleted subparagraphs a, b, and c of paragraph 2 and left the care, custody, and control of the minor child in the wife subject to reasonable rights of visitation by

the husband is affirmed. That portion of the decree which increased the child support payments to $225 per month is vacated and the original sum of $175 per month is reinstated. The parties shall pay their own costs and attorney fees.

AFFIRMED AS MODIFIED.

LYNN M. SAVAGE, APPELLANT, V. HENSEL PHELPS CONSTRUCTION COMPANY, A CORPORATION, AND AETNA CASUALTY AND SURETY COMPANY, A CORPORATION, APPELLEES.

305 N.W.2d 375

Filed May 1, 1981. No. 43542.

1. **Workmen's Compensation.** The Workmen's Compensation Court may, as a condition of awarding compensation to an injured employee, require the employee, if appropriate, to submit himself for evaluation to determine if the employee may be retrained and thereby gainfully employed in the future.
2. **Workmen's Compensation: Time.** Where a reasonable controversy exists between the parties as to the payment of compensation, an injured employee is not entitled to the statutory penalties for waiting time.
3. **Workmen's Compensation: Attorney Fees.** The right to tax attorney fees is purely statutory in a workmen's compensation case.

Appeal from the Nebraska Workmen's Compensation Court. Affirmed.

Harry R. Meister of Winner, Nichols, Meister & Douglas for appellant.

Holtorf, Kovarik, Nuttleman & Ellison, P.C., and James M. Mathis for appellees.

Heard before KRIVOSHA, C.J., BOSLAUGH, MCCOWN, CLINTON, BRODKEY, WHITE, and HASTINGS, JJ.

KRIVOSHA, C.J.

The appellant, Lynn M. Savage (Savage), appeals from a judgment entered by a three-judge panel of the

Workmen's Compensation Court finding that Savage, while in the employ of appellee Hensel Phelps Construction Company (Hensel Phelps), suffered injuries to his back and that, as a result of such injuries, Savage was totally disabled from March 29, 1978, to the date of the rehearing on March 25, 1980, and will continue to be so disabled for an indefinite period of time. The compensation court further found that, as a result of the accident and injury, Savage is unable to perform work for which he has previous training or experience and is entitled therefore to seek vocational rehabilitation services, including retraining and job placement, if possible, to the extent as may be reasonably necessary to restore him to suitable employment. The compensation court further found that there was a reasonable controversy between the parties in regard to the suspension of disability payments which occurred during the course of the dispute and that, therefore, Savage's request for penalties and attorney fees should be denied. Also denied was Savage's request for the cost of travel from Nebraska to Massachusetts where Savage's treating physician resided and where the surgery was performed. We believe that the compensation court was correct in all respects and the judgment should be affirmed.

Savage assigns three specific errors as the basis for this appeal. Savage maintains as his first assignment of error that the compensation court erred "[i]n failing to find that the plaintiff is totally permanently disabled." The second assignment of error is that the compensation court erred in forcing Savage to take vocational rehabilitation services when he is not able to be retrained and restored to suitable employment. And, third, the compensation court erred in not awarding all medical travel expenses, penalty, and attorney fees. We shall address the errors in the order assigned by Savage.

Turning to the first error, that the court failed to find that Savage was totally permanently disabled, we

believe that Savage misinterprets the compensation court's order. The order of the compensation court, entered May 27, 1980, specifically provides, in part, as follows: "[A]s a result of said accident and injury the plaintiff incurred hospital and medical expenses and was totally disabled from March 29, 1978, to the date of this rehearing on March 25, 1980, and will continue to be so disabled for an indefinite future period of time." Moreover, the court's award provides, in part, as follows: "That the plaintiff have and recover of the defendants the sum of $140.00 per week for 104 weeks to and including the date of this rehearing on March 25, 1980, and a like sum per week thereafter for as long as plaintiff shall remain totally disabled as a result of said accident and injury."

Apparently, Savage believes that the compensation court's award should not have been in any manner qualified by inserting the words "for as long as plaintiff shall remain totally disabled as a result of said accident and injury." We know of no such prohibition imposed upon the compensation court. The appellees concede and accept, for the purposes of this accident, that Savage is presently permanently disabled, and we are unable to discern what more we can order under the law. The first assignment of error must be overruled.

We believe that Savage's real complaint goes to his second assignment of error. He believes that he should not be forced to take vocational rehabilitation services when he is not able to be retrained and restored to suitable employment. The order, however, does not require him to take the training. It merely provides that: "The plaintiff should contact the Rehabilitation Specialist of the Nebraska Workmen's Compensation Court within 30 days after the date of this Award in order to be referred to a qualified physician or facility *for evaluation and report of the practicability of, need for and kind of service, treatment or training necessary and appropriate to render him fit for a remunerative occupation.*" (Emphasis supplied.) Savage argues that, at age 62

and with limited education and training, it would be difficult, if not impossible, for him to be retrained for any kind of gainful employment. That may be absolutely true. The order of the compensation court, however, does not require him to obtain employment or even submit to retraining if such training is not appropriate. It merely requires him to contact the rehabilitation specialist of the Nebraska Workmen's Compensation Court so that he may be evaluated. If the evaluation discloses that Savage is indeed correct in his conclusion and he cannot be retrained, that is the end of the matter. Such an evaluation is totally consistent with the purpose of the Workmen's Compensation Act. See Neb. Rev. Stat. § 48-162.01 (Reissue 1978).

In *Camp v. Blount Bros. Corp.*, 195 Neb. 459, 466, 238 N.W.2d 634, 639 (1976), we noted: "Since there is a possibility that rehabilitation services might reduce the liability of the Second Injury Fund we believe the State of Nebraska should be given an opportunity to request that the plaintiff be required to submit to an evaluation at its expense." Likewise, we believe that Hensel Phelps is entitled to such an opportunity. Obviously, if Savage is not retrainable and cannot obtain employment, he will not be penalized in any manner. On the other hand, if, indeed, he can be retrained and can obtain gainful employment, it is both to his advantage and to the advantage of Hensel Phelps and Aetna that such action be taken. The Workmen's Compensation Court may, as a condition of awarding compensation to an injured employee, require the employee, if appropriate, to submit himself for evaluation to determine if the employee may be retrained and thereby gainfully employed in the future. We believe that there was nothing improper in the compensation court requiring, as a condition of payment, that Savage at least submit himself for evaluation. We accordingly overrule the second assignment of error.

Turning then to the last assignment of error, the

question of whether the temporary disability payments were unreasonably withheld so as to entitle Savage to penalty and attorney fees, and whether he was entitled to be reimbursed for the cost of travel from Lincoln to Massachusetts, we believe, likewise, the assignment must be overruled. We have previously held that where a reasonable controversy exists between the parties as to the payment of compensation, an injured employee is not entitled to the statutory penalties for waiting time. See *Spiker v. John Day Co.*, 201 Neb. 503, 270 N.W.2d 300 (1978). Whether or not there was a reasonable controversy between the parties is always a question of fact. In *White v. Western Commodities, Inc.*, 207 Neb. 75, 295 N.W.2d 704 (1980), we again reiterated the oft-noted rule that in reviewing a judgment of the Workmen's Compensation Court, this court is bound by findings of fact made by such compensation court after rehearing to the extent that such findings have support in the evidence. We cannot say that the compensation court's finding that there was a reasonable controversy is without support in the record. That being the case, we are not at liberty to reverse that finding and therefore we affirm the action of the compensation court in denying penalties.

As to the matter of attorney fees, what we have said with regard to the compensation court's refusal to order the payment of a penalty applies to its refusing to order the payment of an attorney fee. The right to tax attorney fees is purely statutory in a workmen's compensation case. See, Neb. Rev. Stat. § 48-125 (Reissue 1978); *Rexroat v. State*, 143 Neb. 333, 9 N.W.2d 305 (1943). We find no statutory authorization to impose attorney fees in this case.

As to the matter of travel expenses from Nebraska to Massachusetts, the compensation court refused to allow Savage's request for payment, limiting the payment of travel expense reimbursement to driving while in Massachusetts. This was apparently due to the provisions of Neb. Rev. Stat. § 48-120 (Reissue 1978), which provides,

in part, as follows: "If the employee shall select a physician located in a community not the home or place of work of the employee, and a physician is available in the local community or in a closer community, no travel expenses shall be required to be paid by the employer or his insurer."

The compensation court apparently found from the evidence that a physician was available in the local community or in a closer community than Massachusetts where Savage's daughter lived. Our review of the record supports that view, and we cannot say the compensation court was in error.

Furthermore, the record fails to disclose any evidence to support Savage's claim as to either the miles traveled or expenses incurred. We must, therefore, overrule Savage's last assignment of error. The judgment of the compensation court is correct in all respects and the judgment is affirmed.

AFFIRMED.

BRODKEY, J., concurs in result.

STATE OF NEBRASKA, APPELLEE, V. FARUQ AL-HAFEEZ, ALSO KNOWN AS RAYMOND L. MOSS, APPELLANT.

305 N.W.2d 379

Filed May 1, 1981. No. 43757.

1. **Courts: Judgments.** The purpose of an order nunc pro tunc is to correct the record so that it will truly reflect action actually taken, but which through inadvertence or mistake has not been truly recorded.
2. ____: ____. The limited remedy available in an application for an order nunc pro tunc will not be extended to question the constitutionality of the actions taken or declined to be taken by the trial court, but is limited to the specific purpose of the proceeding, that is, to correct the record to accurately reflect what actually happened in the proceedings.

Appeal from the District Court for Douglas County: JOHN E. CLARK, Judge. Affirmed.

Faruq Al-Hafeez, pro se.

Paul L. Douglas, Attorney General, and Shanler D. Cronk for appellee.

Heard before KRIVOSHA, C.J., BOSLAUGH, MCCOWN, CLINTON, BRODKEY, WHITE, and HASTINGS, JJ.

WHITE, J.

Defendant Moss was convicted in the District Court for Douglas County, Nebraska, in 1970 for the crimes of sodomy, robbery, and the use of a firearm in the commission of a felony. He was sentenced to a term of from 25 to 30 years on the robbery charge, 10 to 15 years on the sodomy charge, and 5 years for use of a firearm in the commission of a felony. This latter sentence is to run consecutively to the other sentences which are to run concurrently with one another. In August 1980 the defendant filed an action in the District Court for Douglas County seeking an order nunc pro tunc to credit the defendant with 88 days of jail time served awaiting trial in the District Court. The District Court denied request for the order nunc pro tunc and the defendant appeals. We affirm.

The defendant makes four assignments of error, but they may be condensed into two: That the District Court erred (1) in finding that it did not have authority to amend the judgment of 1970 nunc pro tunc to give credit for the 88 days previously served, and (2) in failing to find that the crediting of 88 days served prior to trial was required by the equal protection clause of the United States Constitution.

Neb. Rev. Stat. § 83-1,106 (Reissue 1976) provides that the District Court in passing sentence may give credit to the defendant for time served pending trial of the cause. Such was not the case on November 6, 1970, when the defendant was sentenced. Neb. Rev. Stat. § 83-1,106 (Cum. Supp. 1969) then provided: "Credit against the maximum term and any minimum term may be given by the Director of Corrections to an

offender for time spent in custody as a result of the criminal charge for which a prison sentence is imposed or as a result of the conduct on which such a charge is based." The trial judge at the time of sentencing had no power to give credit for time served prior to sentencing. The power to grant credit for time served awaiting trial was vested in the Director of Corrections. The record of the sentencing does not indicate that the trial judge took into account the time spent in jail awaiting trial, nor that he did not. In any event, the trial judge had no such power to give such credit at the time of the sentence and the District Court had no such power at a later time.

The purpose of an order nunc pro tunc is to correct the record so that it will truly reflect action actually taken, but which through inadvertence or mistake has not been truly recorded. *State v. Coffen*, 184 Neb. 254, 166 N.W.2d 593 (1969); *State v. Kortum*, 176 Neb. 108, 125 N.W.2d 196 (1963).

There is no contention or proof that there was any mistake in the sentence that was imposed and not granting credit for time served while awaiting trial, nor was there any power in the trial court to do that which is now requested even if it had been requested or considered by the trial court at the time of sentence. The first assignment of error is without merit.

The second assignment of error will not be considered at this time. While it is true that the defendant is free to raise a constitutional infirmity in the judgment and conviction in proceedings had with respect to his trial and sentencing for the specific crimes, the vehicle chosen is not the proper one to do so. Any constitutional infirmity may be appropriately raised in the provisions of the Nebraska Post Conviction Act. Neb. Rev. Stat. §§ 29-3001 through 29-3004 (Reissue 1979). The limited remedy available in an application for an order nunc pro tunc will not be extended to question the constitutionality of the actions taken or declined to be taken by the trial court, but is limited to

the specific purpose of that proceeding, i.e., to correct the record to accurately reflect what actually happened in the proceedings.

The appeal is without merit and the action of the District Court is therefore affirmed.

AFFIRMED.

SUSAN FOURNELL, APPELLANT, V.
USHER PEST CONTROL CO., A CORPORATION, APPELLEE.
DAVID FOURNELL ET AL., APPELLANTS, V.
USHER PEST CONTROL CO., A CORPORATION, APPELLEE.

305 N.W.2d 605

Filed May 8, 1981. No. 43200.

1. **Damages: Negligence.** If an actor's conduct is negligent as creating an unreasonable risk of causing either bodily harm or emotional disturbance to another and it results in such emotional disturbance alone without bodily harm or other compensable damage, the actor is not liable for such emotional disturbance.
2. ____: ____. Under the circumstances here, conduct involving the failure of the defendant to discover termite damage to plaintiffs' house did not create an unreasonable risk of causing bodily harm as a matter of law.

Appeal from the District Court for Lancaster County: DONALD E. ENDACOTT, Judge. Affirmed.

Richard D. Sievers of Marti, Dalton, Bruckner, O'Gara & Keating, P.C., for appellants.

Donald R. Witt of Baylor, Evnen, Curtiss, Grimit & Witt for appellee.

Heard before KRIVOSHA, C.J., BOSLAUGH, MCCOWN, BRODKEY, WHITE, and HASTINGS, JJ., and COLWELL, District Judge.

MCCOWN, J.

This is an action for damages for mental or emotional disturbance resulting from alleged negligence of the defendant in connection with a termite inspection of

plaintiffs' home. The District Court sustained defendant's motion for summary judgment and plaintiffs have appealed.

In February 1978 the plaintiffs, a young couple with two small children, were in the process of purchasing a new home. As a part of an offer to purchase the house plaintiffs requested a termite inspection and requested that it be done by the defendant. The defendant made the termite inspection and a written report was prepared and delivered. The report stated that there was termite tubing in two described areas and gave an estimated cost of treatment. The plaintiffs interpreted the report to mean that there was evidence of termite activity at one time but that there was no damage present and that defendant recommended treatment. Plaintiffs then employed Mid-State Pest Control, which treated the house for termites. The sale was then closed and plaintiffs moved into the house on March 28, 1978.

In May or June 1978 plaintiff Susan Fournell, in tearing up carpet in the living room, discovered extensive termite damage in the flooring. Plaintiffs called Mid-State and later the defendant, and defendant found active termites in the house and recommended that the house be treated. Plaintiffs then removed the siding and discovered termite activity running all the way to the roof, involving mud sills, plates, windows, doors, casings, and siding. A structural engineer examined the house and estimated the extent and cost of the necessary repairs. Work began in the latter part of June and plaintiffs did much of it themselves.

On July 3, 1978, Susan Fournell consulted a physician because she was constantly crying, could not sleep, and was deeply depressed. On July 19, 1978, she was hospitalized under the care of a psychiatrist who treated her for reactive depression. She was discharged from the hospital on August 6, 1978. She was again hospitalized on September 13, 1978, and discharged

on September 21, 1978. She was again hospitalized on October 10, 1978, and discharged on October 18, 1978, as still depressed but no longer actively suicidal. She has continued to be treated by psychiatrists since October of 1978, and the evidence is that her mental and emotional disturbance was caused by the discovery of the termite infestation and damage to her home.

Plaintiffs brought separate actions against the defendant involving Susan's claim for damages for emotional disturbance and David's claim for medical expenses incident to that claim, and a cause of action for property damage. Mid-State Pest Control was joined as a third-party defendant. After the taking and filing of various depositions and answers to interrogatories, the defendant filed motions for summary judgment as to all the causes of action. The District Court overruled defendant's motion for summary judgment with respect to plaintiffs' claim for property damage, and that cause of action remains pending in the District Court.

The District Court found from the evidence adduced that two elements essential to a recovery under Nebraska law for the negligent infliction of emotional trauma were not present: (1) That physical injury resulted from the emotional trauma; and (2) That defendant's negligence placed the injured party, Susan Fournell, in fear of peril for her own safety. The court therefore found that there was no genuine issue as to any material fact and that defendant was entitled to judgment as a matter of law, and dismissed plaintiffs' remaining petitions. This appeal followed.

In the present case there are many genuine issues of fact, including the facts necessary to determine whether either the defendant or the third-party defendant was negligent and whether the plaintiff Susan Fournell suffered severe emotional disturbance with resulting physical disability. However, unless

we were to recognize the right of a plaintiff to recover under the circumstances here, none of the facts are material because even if the factfinder resolved every factual dispute in favor of the plaintiff, as we are required to assume would be done, she still would have failed to state a cause of action for negligent infliction of emotional trauma.

Traditionally, recovery for the negligent infliction of emotional trauma was viewed with disfavor by the courts, and the older cases generally rested on broad statements that there was no duty to refrain from the negligent infliction of mental distress. See *Spade v. Lynn & Boston Railroad*, 172 Mass. 488, 52 N.E. 747 (1899). Modern cases have developed various rules circumscribing defendant's liability in such cases. Basically, such rules rest on policy considerations and there have been few modern cases in Nebraska upon which to base a formulation of current policy.

In the case of *Owens v. Childrens Memorial Hospital, Omaha, Nebraska*, 347 F. Supp. 663 (D. Neb. 1972), the federal district court interpreted the position of this court at that time and determined that even though Nebraska had abrogated the "impact" rule there was still a requirement that some type of physical injury result from the negligently inflicted suffering and that recovery for emotional disturbance must be limited by at least requiring the plaintiff to have been within the "zone of danger or actually put in fear for his own safety." That interpretation was correct.

Restatement (Second) of Torts § 436 A (1965) provides: "If the actor's conduct is negligent as creating an unreasonable risk of causing either bodily harm or emotional disturbance to another, and it results in such emotional disturbance alone, without bodily harm or other compensable damage, the actor is not liable for such emotional disturbance."

In the case at bar, when the termite damage was discovered by the plaintiffs no physical injury resulted

to anyone, nor was Susan Fournell placed in fear of bodily harm to herself or anyone else. The plaintiffs' claim for damages here rests on mental and emotional disturbance and distress alone.

It should be noted also that under the Restatement rules relative to liability for the negligent infliction of emotional distress or disturbance, §§ 313, 436, and 436 A, liability is predicated on conduct deemed negligent because it involves an unreasonable risk of causing bodily harm to a person, not damage to property. On the evidence in this case it is evident that conduct involving the failure of the defendant to discover termite damage to plaintiffs' house did not create an unreasonable risk of causing bodily harm to Susan Fournell as a matter of law.

Plaintiffs assert that the case of *Rasmussen v. Benson*, 135 Neb. 232, 280 N.W. 890 (1938), fully supports plaintiffs' position in the case at bar. We disagree. *Rasmussen* is distinguishable on the basis pointed out in the *Owens* case. It is also apparent that the court in *Rasmussen* regarded the defendant's conduct in disposing of a poison label and selling bran with a tremendous amount of arsenic in it at a public sale without warning or labeling of any sort as creating such an unreasonable risk of harm to persons as to be reckless and wanton to such a degree that it approached intentional injury. In any event, the case at bar is no current version of *Rasmussen*.

Policy considerations primarily determine whether a particular plaintiff is entitled to redress for a particular wrong or that a defendant is entitled to restrictions limiting liability. Be that as it may, the law must also recognize that not every human loss arising out of another's conduct constitutes a legal injury for which compensation will be available. See Prosser, Law of Torts 1 (4th ed. 1971).

The judgment of the District Court was correct and is affirmed.

AFFIRMED.

KRIVOSHA, C.J., dissenting.

I find that I must respectfully dissent from the majority in this case.

At the outset, I think it important to keep in mind that only a limited question is before us. Simply stated, it is whether the defendant is entitled to a summary judgment because, as a matter of law, Mrs. Fournell has failed to state a cause of action and failed to raise a genuine issue of fact. In contrast, we have in essence decided this case as if a demurrer had been filed by the defendant. It could very well be that, upon trial, Mrs. Fournell would be unable to prove the essential elements of her claim or the jury would be unwilling to find in her favor. That is not the issue before us. The sole and only issue before us is whether Mrs. Fournell is entitled to have her day in court.

The matter of granting summary judgment is not to be lightly taken and is never to be a substitute for trial. In *Ingersoll v. Montgomery Ward & Co., Inc.*, 171 Neb. 297, 300, 106 N.W.2d 197, 199 (1960), we said: "In considering a motion for summary judgment the court should view the evidence in the light most favorable to the party against whom it is directed, giving to that party the benefit of all favorable inferences that may be reasonably drawn therefrom." And in *Hiram Scott College v. Insurance Co. of North America*, 187 Neb. 290, 295, 188 N.W.2d 688, 691 (1971), we said: "Summary judgment is an extreme remedy and should be awarded only when the issue is clear beyond all doubt. Any reasonable doubt touching the existence of a genuine issue of material fact must be resolved against the moving party." In *McDowell v. Rural Water Dist. No. 2*, 204 Neb. 401, 282 N.W.2d 594 (1979), we further said: "Before a summary judgment may be granted, the moving party must establish that there exists no genuine issue as to any material fact in the case, and that under the facts he is entitled to a judgment as a matter of law. Even where there are no conflicting evidentiary

facts, a summary judgment is not appropriate if the ultimate inferences to be drawn from those facts are not clear. In considering such a motion, the trial judge must take that view of the evidence most favorable to the party against whom summary judgment is directed, giving to that party the benefit of all favorable inferences that may reasonably be drawn from the evidence." (Syllabus of the court.) And in *Blue v. Champion International Corp.*, 204 Neb. 781, 285 N.W.2d 511 (1979), we said: "Where reasonable minds may differ as to whether an inference supporting the ultimate conclusion sought can be drawn, summary judgment should not be granted." (Syllabus of the court.) And, finally, in *State ex rel. Schuler v. Bd. of County Commissioners*, 205 Neb. 647, 649, 289 N.W.2d 514, 515 (1980), we said: "The burden is upon the party moving for summary judgment to show that no issue of fact exists, and unless he can conclusively do so, the motion must be overruled."

The majority in this case has concluded that Mrs. Fournell cannot, as a matter of law, recover because of two reasons. The first reason given by the majority is that one may not recover for emotional disturbances without there being a concurrent bodily injury; and, secondly, because "as a matter of law" a woman cannot reasonably become emotionally distressed because her home is destroyed by termites. I shall attempt to address both matters in this dissent.

The majority's conclusion that one may not recover for emotional disturbance without bodily harm is based, in part, upon the Restatement (Second) of Torts § 436 A (1965), set out in full in the majority opinion. I believe that the rule is outmoded and should be rejected. While the Restatement rule quoted may reduce the number of claims made, it is totally out of step with modern medical knowledge. To suggest that a psychological injury is not as grievous as a physical injury is to ignore reality. And to further suggest that if one can be sufficiently mentally dis-

turbed so as to suffer a coronary occlusion, he or she may recover in tort, but if he or she simply becomes an emotionally distressed person, reduced to sniveling and crying and attempting suicide, he or she may not recover, does not seem to me to be founded upon any rational basis.

It is interesting to note that while the American common law rule, exemplified by the Restatement, is based at least in part upon early English law, England has long since abandoned that requirement.

The case which was frequently relied upon by American courts as authority for denying recovery for negligently inflicting mental anguish, absent physical injury, was *Victorian Railways Comm. v. Coultas*, 13 App. Cas. 222, 57 L.J.P.C. 69 (1888). In *Coultas*, the plaintiff was severely frightened when the gatekeeper at a railway crossing negligently allowed her to cross the track in front of an approaching train. There was no impact or immediate physical injury. However, she suffered severe nervous shock, fainted, and experienced impairment of her eyesight and memory. The trial court sustained a verdict for the plaintiff. However, on appeal, the Privy Council held that damages arising from mere terror, without any physical injury, could not be considered as a foreseeable consequence of the negligence of the defendant, and the verdict was set aside. For a further discussion, see Smith, *Relation of Emotions to Injury and Disease: Legal Liability for Psychic Stimuli*, 30 Va. L. Rev. 193 at 196-97 (1944); Campbell, *Injury Without Impact*, 1951 Ins. L.J. 654.

Within 2 years, however, another English court had taken a conflicting view of the issue and thus was born the controversy which remains with us today. A case arising in Ireland, *Bell v. Great Northern Railway Co.*, 26 L.R. Ir. 428 (1890), totally repudiated the reasoning of *Coultas*. The opinion of Baron Palles is often quoted: "In conclusion, then, I am of the opinion that, as the relation between fright and injury to the

nerve and brain structures of the body is a matter which depends entirely upon scientific and medical testimony, it is impossible for any Court to lay down, as a matter of law, that if negligence cause fright, and such fright, in its turn, so affects such structures as to cause injury to health, such injury cannot be 'a consequence which, in the ordinary course of things would flow from the' negligence, unless such injury 'accompany such negligence in point of time.'" *Id.* at 442. It is of passing interest to note that, in 1890, a court with limited medical knowledge concluded that one could not, as a matter of law, resolve such an issue. Yet in 1981 we conclude, as a matter of law, that absent bodily harm, one may not recover for emotional disturbance.

In 1901 the King's Bench abandoned the rule laid down in *Coultas.* In the case of *Dulieu v. White & Sons*, [1901] 2 K.B. 669, a woman who was frightened into giving premature birth, when the defendants drove a pair-horse van into the main room of her husband's pub while she was standing behind the bar, sued for damages. The nervous shock which she suffered from the incident made her ill and gave rise to premature birth of her child. Relying largely upon the *Bell* case, Justice Kennedy overruled the demurrer, commenting upon the remoteness objection which had led courts to deny recovery in such action. He said that remoteness refers not to relations in time but to the continuity of causation. He further commented that nonliability for negligent invasion of another's mental tranquility is generally explained by the practical difficulties of proving the injury and not by the lack of any legal wrong. Justice Kennedy concluded in *Dulieu* by holding that where a physical disability is caused by fright or mental disturbance, the subject of the requested compensation may be objectively evaluated and no logical reason remains for denying recovery. After *Dulieu*, English law became settled that actual injury or

disability negligently caused by psychic stimuli was actionable, whether or not the plaintiff suffered an impact or contemporaneous injury.

The present English rule has been recognized by some of the American courts, though the specific theories upon which such recovery has been permitted have varied from jurisdiction to jurisdiction. Louisiana, which has adopted the French civil code, has historically recognized the right to recover such damages without any physical harm. See, *Romero v. Town of Welsh*, 370 So. 2d 1286 (La. App. 1979); *J. B. Lahaye Farms v. La. Dept. of Highways*, 377 So. 2d 1286 (La. App. 1979); *Elston v. Valley Electric Membership Corp.*, 381 So. 2d 554 (La. App. 1980). Further, see Cooks, *Mental Anguish Arising from Property Damage*, 3 So. U.L. Rev. 17 (1976).

A similar approach has been taken by the Texas courts. In *Cactus Drilling Co. v. McGinty*, 580 S.W.2d 609 (Tex. Civ. App. 1979), a drilling company improperly used the plaintiff's land. The court held that recovery for mental anguish arising from that act was recoverable, saying: "Given an injury to property which is actionable independently and separately from mental anguish, compensation for mental anguish which proximately results from the wrongful injury is one element of actual damages." *Id.* at 610. For other cases to the same effect, see *Hendry v. United States*, 280 F. Supp. 27 (S.D.N.Y. 1968), *aff'd* 418 F.2d 774 (2d Cir. 1969); *Petition of United States*, 418 F.2d 264 (1st Cir. 1969). At least five jurisdictions have held that an independent cause of action for negligently inflicted mental distress exists.

In 1970 two states at opposite ends of the nation's geographic boundaries (Maine and Hawaii) adopted new rules allowing recovery for negligently inflicted mental distress, absent any physical injury. In the Maine decision, *Wallace v. Coca-Cola Bottling Plants, Inc.*, 269 A.2d 117 (Me. 1970), the Supreme Judicial Court had for consideration an action arising against a

soft-drink bottler for injuries allegedly resulting to plaintiff who drank from a bottle containing an unpackaged prophylactic. The plaintiff became ill after he returned home and began to think about his experience. In sustaining a jury verdict, the Maine court said: "In the light of advances which have been made by medical science and the improvement in investigatory techniques since this Court decided *Herrick* in 1921 [*Herrick v. Publishing Co.*, 120 Me. 138, 113 A. 16 (1921)], we decline to follow it any longer. Instead, we adopt the rule that in those cases where it is established by a fair preponderance of the evidence there is a proximate causal relationship between an act of negligence and reasonably forseeable [sic] mental and emotional suffering by a reasonably forseeable [sic] plaintiff, such proven damages are compensable even though there is no discernable [sic] trauma from external causes. The mental and emotional suffering, to be compensable, must be substantial and manifested by objective symptomatology." *Id.* at 121. In its decision, the Supreme Judicial Court of Maine noted that the reasoning in *Spade v. Lynn & Boston Railroad*, 172 Mass. 488, 52 N.E. 747 (1899), noted by the majority in this case, has been the object of much critical comment in legal periodicals and cases and has been rejected by the New Hampshire court.

During the same year, the Supreme Court of Hawaii was presented the case of *Rodrigues v. State*, 52 Hawaii 156, 472 P.2d 509 (1970). In the *Rodrigues* case the plaintiffs' home was flooded during a rainstorm because the state highway workers negligently blocked a drain culvert. The plaintiffs were not present at the time of the flooding so they suffered no impact or physical injury. The court noted: "The traditional rule, based upon considerations of policy we discuss herein, is that there is no recovery for the negligent infliction of mental distress alone." *Id.* at 169.

The Supreme Court of Hawaii then rejected that notion and upheld the award for the mental anguish, absent physical injury. The primary consideration, said the Hawaii court, should be to assure the genuineness of such claims. The court then adopted standards to guarantee genuineness as well as require that the mental anguish is indeed serious. With those requirements present, the court then declared that normal tort principles are to be applied to determine the right of recovery.

The State of Washington, likewise, appears to have aligned itself with those courts which now recognize what I believe to be the more realistic approach to mental distress. In *Hunsley v. Giard*, 87 Wash. 2d 424, 435, 553 P.2d 1096, 1102-03 (1976), the Washington court held: "Balancing those interests and subject to the limitations hereinafter set forth, we conclude that the plaintiff who suffers mental distress has a cause of action; that is to say, the defendant has a duty to avoid the negligent infliction of mental distress. It is not necessary that there be any physical impact or the threat of an immediate physical invasion of the plaintiff's personal security." See, also, *Corrigal v. Ball & Dodd Funeral Home*, 89 Wash. 2d 959, 577 P.2d 580 (1978).

In 1980 the California Supreme Court adopted the more modern view in the case of *Molien v. Kaiser Foundation Hospitals*, 27 Cal. 3d 916, 616 P.2d 813, 167 Cal. Rptr. 831 (1980). The *Molien* case involved the question of whether the plaintiff husband could recover for the mental distress he suffered as a result of the defendants' negligent and incorrect diagnosis that his wife had syphilis. The California court reversed the trial court's sustaining of the defendants' demurrers and ordered the case to trial. In so doing it created an independent cause of action in California, saying: "In our view of the attempted distinction between physical and psychological injury [it] merely clouds the issue. The essential question is one of

proof; whether the plaintiff has suffered a serious and compensable injury should not turn on this artificial and often arbitrary classification scheme. We thus agree with the view of the *Rodrigues* court: 'In cases other than where proof of mental distress is of a medically significant nature, [citations] the general standard of proof required to support a claim of mental distress is some guarantee of genuineness in the circumstances of the case. [Citation.]' (472 P.2d at p. 520.) This standard is not as difficult to apply as it may seem in the abstract. . . . [T]he jurors are best situated to determine whether and to what extent the defendant's conduct caused emotional distress, by referring to their own experience." *Id.* at ___, 616 P.2d at 821, 167 Cal. Rptr. at 839.

And finally we find, on March 25, 1981, the Supreme Court of South Carolina deciding the case of *Ford v. Hutson*, 49 U.S.L.W. 2663. In permitting recovery for mental and emotional injury, absent physical injury, the South Carolina court noted that numerous jurisdictions today have recognized that infliction of mental suffering is in fact a cause of action in itself. This new tort is commonly denominated, appropriately, "infliction of emotional distress" or "outrage." In upholding the cause of action, the South Carolina court noted that it had earlier permitted a plaintiff to sue upon a claim in which she alleged she suffered a nervous breakdown after defendant had used vile, profane, and abusive language.

One need not think very long on the matter before one recognizes and concludes that an emotional injury is as serious as, and often more serious than, a physical injury. The damages caused by emotional injuries oftentimes take much longer to heal than a physical injury would.

Cases are legion supporting a cause of action for situations where one becomes ill by reason of finding a foreign object in food, even though the foreign

object is not consumed and does not cause illness. See, *Opelika Coca-Cola Bottling Company v. Johnson*, 46 Ala. App. 298, 241 So. 2d 327 (1970); *Jasper Coca-Cola Bottling Company v. Roberts*, 47 Ala. App. 219, 252 So. 2d 428 (1971); *Way v. Tampa Coca Cola Bottling Company*, 260 So. 2d 288 (Fla. App. 1972); *Paul v. Hardware Mut. Ins. Co.*, 254 So. 2d 690 (La. App. 1971); *Coca-Cola Bottling Co. of Plainview v. White*, 545 S.W.2d 279 (Tex. Civ. App. 1976); *Miller v. Atlantic Bottling Corp.*, 259 S.C. 278, 191 S.E.2d 518 (1972); *Shoshone Coca-Cola v. Dolinski*, 82 Nev. 439, 420 P.2d 855 (1966).

In all of the above-cited cases, and they are but an example of the many that can be found, recovery was permitted because an individual became ill at the thought of the contamination being in the food or drink. One who is so affected by the thought process is mentally injured. It is that clear. To therefore require that, before one who is mentally injured may recover, he must at least regurgitate once seems to me to be imposing upon the law a requirement that makes little or no sense. As I indicated at the outset, I would join with those jurisdictions which have adopted what I perceive to be the more modern view and would permit a cause of action to exist for mental anguish, absent bodily harm or other compensable damage.

Setting aside for the moment my view that one should be permitted to recover for mental anguish, absent bodily harm or other compensable damages, I do not believe that we need reach that issue in this case. An examination of the cases decided by this court on previous occasions should lead one to the conclusion that summary judgment was not appropriate in this case, and the granting of that summary judgment by the trial court should be reversed.

To properly understand what has in fact taken place, one must note all of the evidence presented in opposition to the motion for summary judgment, in-

cluding the deposition of Mrs. Fournell and her treating psychiatrist.

The record presented to us on the motion for summary judgment discloses that in January of 1978 marital difficulties existing between Mr. and Mrs. Fournell resulted in their obtaining a decree of divorce. This was then set aside in February of 1978 when they reconciled. Part of the reconciliation process was the purchase of a new home located at 3772 Everett Street in the city of Lincoln, Nebraska, the previous home having been sold in connection with the divorce. The Fournells borrowed $35,000 for the purchase of the house, though between them they had a total monthly income of only $1,200.

As noted by the majority, in May or June of 1978 Mrs. Fournell discovered extensive termite damage in the flooring even though a termite inspection had been performed by the defendant. The cost of repair was in excess of $15,000. The Fournells did not have that money and had to borrow the $15,000 in addition to the $35,000 they had already borrowed for the house in the first instance. Only one contractor was even willing to bid on the repair project, and it was necessary to discharge him when it appeared he was unable to do the job adequately for the bid price. Mr. Fournell wound up making the repairs himself by working weekends and after his job. The $15,000, however, proved to be inadequate for the materials necessary to repair the damage and the Fournells were unable to complete the repairs. Left uncompleted at their home were the repairs to the garage, additional insulation, and certain drywall work.

The record further discloses that beginning in July of 1978, as the repair was underway, the contractor was not doing what he was hired to do and the family was having unusual strain put upon it by reason of all these difficulties. Mrs. Fournell found it necessary to consult Dr. Glen Lau. At the time she was constantly

crying, could not sleep, was shaking, and, in general, was depressed. Things got worse, and on July 19, 1978, Mrs. Fournell was hospitalized by Dr. Whitla, a psychiatrist. The hospitalization covered the period from July 19, 1978, to August 6, 1978. Mrs. Fournell was next hospitalized on September 13, 1978, and remained in the hospital until September 21, 1978. On October 10, 1978, she was again hospitalized when she took an overdose of Thorazine in an attempt to commit suicide. She was discharged on October 18, 1978, when, according to Dr. Whitla, she was still depressed but no longer actively suicidal. She remains, according to the record, under medical care.

By reason of her mental and physical condition, she was unable to maintain active employment. As a result, the Fournells and their two children were trying to live on $300 per month after their $500-per-month house and construction loans were paid.

The deposition of Dr. Whitla establishes that Mrs. Fournell had suffered a "psychic injury" as a result of discovering the termites. He defined a "psychic injury" as basically reactive depression demonstrated by physiological consequences. By definition, physiological consequences must relate to some injury to the body. The evidence as presented to us at this point on the motion for summary judgment, then, is to the effect that, as a result of the negligence of the defendant, Mrs. Fournell suffered a mental breakdown, evidenced by shaking, crying, depression, inability to sleep, and an attempt to commit suicide. That does not significantly differ from those cases in which we have heretofore permitted recovery.

In the case of *Hanford v. Omaha & C.B. Street R. Co.*, 113 Neb. 423, 203 N.W. 643 (1925), we held that where a woman standing at a street intersection within a few feet of the track upon which two streetcars collided was greatly frightened thereby, and

jumped back and immediately felt sick and 3 days later suffered a miscarriage, the reasonableness of her fright and subsequent conduct were questions for the jury. We further held in *Hanford* that where a pregnant woman is placed in a position of reasonably apprehended peril by the negligence of one owing her a legal duty, and suffers a miscarriage as a proximate result of shock and fright produced by such negligence, she may recover damages from the wrongdoer. *Hanford* did not require any immediate physical injury but only that any ultimate physical injury be proximately caused by the mental injury occasioned by the negligence of the defendant.

In *LaSalle Extension University v. Fogarty*, 126 Neb. 457, 253 N.W. 424 (1934), we specifically held that threats to sue and to appeal to one's employer, made willfully and intentionally, for the purpose of producing mental pain and anguish in attempting to collect a debt, authorizes recovery for mental pain and suffering though no physical injury results. Admittedly, the *LaSalle Extension University* case involved an intentional tort, but the concern about the reliability of proof of the injury is no less or different whether committed by an intentional act or by a negligent act.

In *Rasmussen v. Benson*, 133 Neb. 449, 275 N.W. 674 (1937), *on rehearing* 135 Neb. 232, 280 N.W. 890 (1938), noted by the majority, we permitted recovery to a dairy farmer who bought a sack of bran at a farm sale and later discovered that the bran contained lethal levels of arsenic which destroyed his dairy herd and ruined his business. Plaintiff suffered great mental anguish as a result of the loss and his concern about whether others might have consumed the poisonous milk. Within a year he suffered a heart attack and died. Again, there was no immediate physical injury. The majority suggests that *Rasmussen* was an intentional tort case or at least reckless and wanton behavior. The case, however,

was tried on a traditional theory of negligence.

I find it difficult to rationally distinguish why a mental injury which ultimately results in a breakdown of one's arterial system is compensable but a mental injury resulting in an ultimate breakdown of one's nervous system is not. This court at least implied that such distinction should not exist when, in the earlier *Rasmussen* case, it said at 458, 275 N.W. at 679: "A mental shock or disturbance sometimes causes injury or illness to the body, especially to the nervous system. Now, if the shock or fright was a natural consequence of what was brought about by the circumstances of the loss of Rasmussen's business, — the death of his live stock, — then such nervous shock was the proximate cause of Rasmussen's physical and mental condition that led to his death." And on rehearing in *Rasmussen*, we said: "Damages for actual injury resulting from fright and shock are recoverable, although not accompanied by a contemporaneous injury." (Syllabus of the court.) Yet we are now saying as a matter of law that crying, shaking, withdrawing, experiencing depression, and attempting to commit suicide are not sufficiently physical in nature to constitute subsequent physical injury entitling one to recover if believed by a jury.

I am unable to determine how we can find, as a matter of law, that Mrs. Fournell has not suffered bodily harm sufficient to bring her within the Restatement rule announced by the majority and thereby entitle her to a trial on the merits.

For that reason, I believe that the majority is in error and I must dissent.

I make but brief comment on the majority's second point to the effect that "under the circumstances here, conduct involving the failure of the defendant to discover termite damage to plaintiffs' house did not create an unreasonable risk of causing bodily harm *as a matter of law*." I gather that it is the position of the majority of the court that an owner of

real estate may not be so distressed by serious damage to his or her property which cannot be easily repaired that the owner may suffer serious mental distress. And it appears that the majority also believes, as a matter of law, that one in the termite business should not recognize that an owner of property may be seriously affected emotionally by the failure to find termites in the property before a purchase. The basis for the business itself appears, as advanced by the exterminators, to be to permit one to be at rest, knowing that termites are not at work while owners are at sleep. The majority may declare that such cannot happen, but both the facts of this case and the realities of life dispute that conclusion. It is no accident that one's home is considered one's castle. I am at a loss to understand how we may conclude, as we have here, that "under the circumstances" (as a matter of fact) there was not an unreasonable risk "as a matter of law," but at the same time acknowledge that there is or may be an unreasonable risk of causing bodily harm if two trolley cars come together in the presence of a pregnant woman or a dairy farmer feeds his cattle contaminated bran.

Whether we choose to adopt the more modern view concerning the right to recover for mental injury or simply acknowledge that Mrs. Fournell has indeed suffered a bodily injury from an emotional disturbance, the granting of a summary judgment in this case is in error. I would have reversed and remanded for further proceedings.

WHITE, J., joins in this dissent.

STATE OF NEBRASKA EX REL. PAUL L. DOUGLAS, ATTORNEY GENERAL, APPELLEE, V. JOY SPORHASE ET AL., APPELLANTS.

305 N.W.2d 614

Filed May 8, 1981. No. 43206.

1. **Constitutional Law.** In order for the commerce clause of the U.S. Constitution to apply to state regulation of a commodity, that commodity must be an article of commerce.
2. **Waters.** Nebraska's common law of ground water permits the overlying landowner to appropriate subterranean waters found under his land, but he cannot extract and appropriate them in excess of a reasonable and beneficial use upon the land which he owns, especially if such use is injurious to others who have substantial rights to the waters; and if the natural underground supply is insufficient for all owners, each is entitled to a reasonable proportion of the whole.
3. **Constitutional Law: Waters.** The Nebraska Constitution declares water for irrigation purposes in the State of Nebraska to be a natural want.
4. **Legislature: Waters.** Since the Nebraska common law of ground water permits use of the water only on the overlying land, legislative action is necessary to allow for transfers off the overlying land.
5. **Legislative Power: Waters.** The Legislature has the power to determine public policy with regard to ground water.
6. **Legislature: Waters.** Ground water may be transferred from the overlying land only with the consent of and to the extent prescribed by the public through its elected representatives.
7. **Waters.** Free transfer and exchange of ground water in a market setting have never been permitted in this state.
8. _____. The public may limit or deny the right of private parties to freely use the water when it determines that the welfare of the state and its citizens is at stake.
9. _____. Nebraska ground water is not an article of commerce.
10. _____. Since water is the only natural resource absolutely essential to human survival, the application of rules designed to facilitate commerce in less essential resources to the transfer of water must be done, if at all, with extreme caution.
11. **Constitutional Law: Statutes: Waters.** Since ground water in Nebraska is not an article of commerce, the commerce clause of the U.S. Constitution does not apply to Neb. Rev. Stat. § 46-613.01 (Reissue 1978).
12. **Waters: Constitutional Law.** Neb. Rev. Stat. § 46-613.01 (Reissue 1978) does not deprive affected persons of liberty or property without due process of law.
13. **Legislative Delegation.** The Legislature cannot delegate its powers

to make a law, but it can make a law to become operative on the happening of a certain contingency or on an ascertainment of fact upon which the law intends to make its own action depend.

14. Waters. The reciprocity provision of Neb. Rev. Stat. § 46-613.01 (Reissue 1978) merely states one of several conditions which must be satisfied before a permit to transfer ground water out of state may issue.
15. ____ Neb. Rev. Stat. § 46-613.01 (Reissue 1978) sets up a reasonable classification of persons which is reasonably related to a legitimate state interest in preserving, for the beneficial use of its citizens, Nebraska's underground water supply, and it operates equally on all members of the affected class.

Appeal from the District Court for Chase County: JACK H. HENDRIX, Judge. Affirmed.

Peter E. Schoon, Jr., and George M. Zeilinger of Padley & Dudden, P.C., for appellants.

Steven C. Smith, Special Assistant Attorney General, of Van Steenberg, Brower, Chaloupka, Mullin & Holyoke for appellee.

Heard before KRIVOSHA, C.J., BOSLAUGH, MCCOWN, CLINTON, BRODKEY, WHITE, and HASTINGS, JJ.

WHITE, J.

Appellants own adjacent tracts of land in Chase County, Nebraska, and in Phillips County, Colorado. A well physically located on the Nebraska tract pumps ground water for the purpose of irrigating crops on both the Nebraska tract and the Colorado tract. Defendants' predecessor in title registered the well with the State of Nebraska on January 18, 1971, as required by Neb. Rev. Stat. § 46-602 (Reissue 1978). However, neither the defendants nor their predecessor in title applied to the Nebraska Department of Water Resources for a permit to transport ground water from the Nebraska well across the border into Colorado as required by Neb. Rev. Stat. § 46-613.01 (Reissue 1978).

The State of Nebraska brought this action in the District Court of Chase County to enjoin defendants from transporting Nebraska ground water into Colorado without a permit. After trial on the merits, the

District Court issued the injunction, holding that § 46-613.01 does not violate the commerce clause of U.S. Const. art. I, § 8, since under Nebraska law water is not an article of commerce. The District Court also held that even if ground water is an article of commerce, the statute does not impose an unreasonable burden on interstate commerce. We affirm.

We start our analysis with the assumption that if the commerce clause is to apply to a state statute regulating the interstate transfer of a commodity, that commodity must be an "article of commerce." The term "commerce" implies that the commodity must be capable of being reduced to private possession and then exchanged for goods or services of the same or similar economic value. An analysis of Nebraska case law and statutes demonstrates that Nebraska law has never considered ground water to be a market item freely transferable for value among private parties, and therefore not an article of commerce.

The first Nebraska case to consider the overlying landowner's proprietary interest in water under his land is *Olson v. City of Wahoo*, 124 Neb. 802, 248 N.W. 304 (1933). The *Olson* court specifically rejected the "English rule" of rights in ground water, which recognizes absolute ownership of ground water in the overlying landowner. Instead, the court adopted a slightly modified version of the more restrictive American rule of "reasonable use": "The American rule is that the owner of land is entitled to appropriate subterranean waters found under his land, but he cannot extract and appropriate them in excess of a reasonable and beneficial use upon the land which he owns, especially if such use is injurious to others who have substantial rights to the waters, and if the natural underground supply is insufficient for all owners, each is entitled to a reasonable proportion of the whole, and while a lesser number of states have adopted this rule, it is, in our opinion, supported by the better reasoning." *Id.* at 811, 248 N.W. at 308. The "pure" American rule,

as stated by other authorities at the time, did not include the concept of sharing in times of shortage, and the *Olson* court's inclusion of that concept demonstrates its view that water is a unique commodity subject to state regulation to assure that it is available to everyone in the state in relation to their need, rather than their ability to pay for it.

The Nebraska Constitution declares water for irrigation purposes in the State of Nebraska to be a natural want. Neb. Const. art. XV, § 4. The decades of the 1930s and 1940s saw a quantum expansion in Nebraska of the use of ground water for irrigation. See Aiken, *Nebraska Ground Water Law and Administration*, 59 Neb. L. Rev. 917 (1980). Legislative recognition of the state's power and the corresponding need to manage the state's ground water resources began in 1957 when the Legislature declared "that the conservation of ground water and the beneficial use thereof are essential to the future well-being of this state." Neb. Rev. Stat. § 46-601 (Reissue 1978), and enacted statutes requiring well registration, well-spacing, and filling of abandoned wells. Neb. Rev. Stat. §§ 46-602 and 46-609 (Reissue 1978).

Transfer of ground water was considered by the Legislature in 1963. Neb. Rev. Stat. §§ 46-638 through 46-650 (Reissue 1978), enacted that year, and § 46-654, enacted in 1965, granted only to cities, villages, and municipal corporations the right to transport ground water out of its basin of origin for the purpose of supplying urban water needs. Since the Nebraska common law of ground water permitted use of the water only on the overlying land, legislative action was necessary to allow for transfers off the overlying land, even for as pressing a need as supplying urban water users.

Metropolitan Utilities Dist. v. Merritt Beach Co., 179 Neb. 783, 799-800, 140 N.W.2d 626, 636 (1966), confirmed that "[u]nderground waters, whether they be percolating waters or underground streams, are

a part of the waters referred to in the Constitution as a natural want. . . [I]t is becoming more important and extremely necessary that regulation and control of all sources of water supply be attained." That court held that it is "the right of the Legislature, unimpaired, to determine the policy of the state as to underground waters and the rights of persons in their use." *Id.* at 801, 140 N.W.2d at 637. The opinion clearly held that the Legislature has the power to determine public policy with regard to ground water and that it may be transferred from the overlying land only with the consent of and to the extent prescribed by the public through its elected representatives.

Only a year after the decision in the *Metropolitan* case, the Legislature enacted the statute at issue in this case, § 46-613.01, dealing with transfer of Nebraska ground water across state lines. The statute allows such transfers conditioned on the receipt of a permit from the director of the Department of Water Resources, who may grant the permit if the transfer "is reasonable, is not contrary to the conservation and use of ground water, and is not otherwise detrimental to the public welfare," and if the receiving state "grants reciprocal rights" providing for transfer of ground water from that state into Nebraska.

The parties concede that Colorado forbids the transfer of ground water outside its borders and has no reciprocity provision in its statute. Neither the courts nor the Legislature of Nebraska have considered Nebraska ground water as an article of commerce. Free transfer and exchange of ground water in a market setting have never been permitted in this state, since the water itself is publicly owned. The public, through legislative action, may grant to private persons the right to the use of publicly owned waters for private purposes; but as the *Olson* opinion demonstrates, with its emphasis on sharing in times of shortage, the public may limit or deny the right of private parties to freely use the water when it de-

termines that the welfare of the state and its citizens is at stake. Even where it appears that water itself is being marketed, as in municipal water supply arrangements, it is the value of the cost of distributing the water that is the basis of the rate structure and not the value of the water itself. See *K. S. B. Tech. Sales v. North Jersey Dist. Water Supply*, 75 N.J. 272, 381 A.2d 774 (1977).

Appellants in their brief place great reliance on the case of *City of Altus, Oklahoma v. Carr*, 255 F. Supp. 828 (W.D. Tex. 1966), *aff'd per curiam* 385 U.S. 35, 87 S. Ct. 240, 17 L. Ed. 2d 34 (1966), which held that a Texas statute forbidding interstate transfers of water without legislative permission placed an unconstitutional burden on interstate commerce. However, at the time of *Altus*, Texas law treated ground water much differently than Nebraska. Texas recognized the absolute ownership of subterranean water in the overlying landowner. This is in sharp contrast to the narrowly circumscribed right of reasonable use only on the overlying land recognized in Nebraska. In addition, the *Altus* court noted that, in Texas, "after the water has been appropriated, the landowner, his lessee or assign, has the right to sell the water to others for use off of the land and outside the basin where produced, just as he could sell any other species of property." *Id.* at 840. In sum, said the *Altus* court, "the general law of the State of Texas . . . recognizes water that has been withdrawn from underground sources as personal property subject to sale and commerce . . . ." *Id.* at 840. Since the only transfers, prohibited by Texas law were interstate transfers, *Altus* found that Texas considered ground water to be an article of commerce, subject to the commands of the commerce clause of the U.S. Constitution. However, intrastate transfers of ground water in Nebraska are permitted only under carefully prescribed conditions and do not resemble a free-market setting. Ground water use is not an unlimited private property

right in Nebraska law. The decision in *Altus* is not controlling. Nebraska ground water is not an article of commerce and thus not subject to the strictures of the commerce clause.

Since the *Altus* case was affirmed without opinion by the U.S. Supreme Court, we must assume that the high court had no quarrel with the District Court's application of the law to the particular facts of *Altus*. However, we need not and do not assume, as appellants would have us do, that *Altus* "overruled *sub silentio*" the 70-year-old holding in *Hudson Water Co. v. McCarter*, 209 U.S. 349, 28 S. Ct. 529, 52 L. Ed. 828 (1908), that a state may, under its police power, forbid or condition the interstate transfer of its water resources without running afoul of the commerce clause. The *Hudson* case upheld the constitutionality of a New Jersey statute prohibiting the transfer of New Jersey surface water out of the state. The court noted that "[a] man cannot acquire a right to property by his desire to use it in commerce among the States," and emphasized that the state as "*quasi*-sovereign and representative of the interests of the public has a standing in court to protect the atmosphere, the water and the forests within its territory, irrespective of the assent or dissent of the private owners of the land most immediately concerned. . . . It finds itself in possession of what all admit to be a great public good, and what it has it may keep and give no one a reason for its will." *Id.* at 355-57.

There have been other U.S. Supreme Court cases limiting the rights of individual states to put conditions on the interstate transfer of natural resources other than water, such as natural gas and minnows. *Penna v. West Virginia*, 262 U.S. 553, 43 S. Ct. 658, 67 L. Ed. 1117 (1923); *Oklahoma v. Kansas Nat. Gas Co.*, 221 U.S. 229, 31 S. Ct. 564, 55 L. Ed. 716 (1911); *Hughes v. Oklahoma*, 441 U.S. 322, 99 S. Ct. 1727, 60 L. Ed. 2d 250 (1979). However, we note that the natural resources dealt with in those cases have historically

been market items, reducible to private possession and freely exchangeable for value. This has never been the case with underground water in Nebraska. Further, since water is the only natural resource absolutely essential to human survival, the application of rules designed to facilitate commerce in less essential resources to the transfer of water must be done, if at all, with extreme caution. It is this caution which prevents us from holding that Nebraska ground water is an article of commerce. Because the ground water in this case is not an article of commerce, the commerce clause considerations do not apply to the Nebraska statute at issue here.

Appellants also urge that § 46-613.01 violates the due process provisions of the fifth and fourteenth amendments to the Constitution of the United States, which prohibit the United States or an individual state from depriving an individual of life, liberty, or property without due process of law. Although the arguments in the "due process" section of appellants' brief are actually equal protection arguments, we note that conditioning a landowner's right to transfer ground water either within or without Nebraska does not deprive him of a property right, since, under Nebraska common law, ground water may not be transferred off the overlying Nebraska land at all unless the public, owners of the water, grant that right. Not being at liberty to transport ground water without public consent and having no private property right in the water itself, appellants are deprived of neither liberty nor property by § 46-613.01.

Nor does the reciprocity provision of § 46-613.01 violate constitutional guarantees of due process, as appellants claim, by delegating legislative authority to the legislature of another state. The Nebraska Legislature has exercised its legislative authority by determining the public policy of the state with regard to ground water and enacting that determination into law. It has not delegated to any other state's legislature

the right to determine Nebraska public policy. The reciprocity provision is merely one of several conditions to be satisfied before a permit to transport water out of state may be granted. As stated in *Lennox v. Housing Authority of City of Omaha*, 137 Neb. 582, 590, 290 N.W. 451, 457 (1940): "The providing of such contingencies upon which the law might properly be limited to take effect does not constitute a delegation of legislative power. The applicable rule is: The legislature cannot delegate its powers to make a law, but it can make a law to become operative on the happening of a certain contingency or on an ascertainment of a fact upon which the law intends to make its own action depend."

In *State v. Padley*, 195 Neb. 358, 237 N.W.2d 883 (1976), the statute at issue set a 55-mile-per-hour speed limit on the portion of Interstate 80 crossing Nebraska, but declared that when the President terminates the Emergency Highway Energy Conservation Act such speed limit will revert to 75 miles per hour. The *Padley* court held that: "In so doing the Legislature has not delegated its power to make the law but has designed its alternative provision to become effective on the happening of a certain contingency." *Id.* at 360, 237 N.W.2d at 885. That court also stated that the rule set out in *Lennox* "is a well-recognized rule of law." *Id.* at 360, 237 N.W.2d at 885. The granting of a permit to transport water for irrigation out of state is contingent upon, among other things, the receiving state granting its landowners the same right. Each state is free to determine its own public policy with regard to ground water transfers and to condition the right to transfer on one or more contingencies. Thus, there has been no unconstitutional delegation of legislative power by the Nebraska Legislature.

Appellants finally argue that § 46-613.01 violates the equal protection clause of the fourteenth amendment to the U.S. Constitution by virtue of an unreasonable classification. The class upon which

§ 46-613.01 operates consists of those persons wishing to transport Nebraska ground water out of state for irrigation purposes. It is plain from the language of the statute that the classification is reasonable. It is related to a legitimate state interest in preserving, for the beneficial use of its citizens, Nebraska's underground water supply, and it operates equally on all members of the class. Any person wishing to transport ground water out of state for irrigation purposes must apply for a permit to do so and the director of the Nebraska Department of Water Resources is to use the same guidelines in every instance in determining whether or not the permit may issue. That the statute does not apply to irrigators who do not wish to transport ground water out of state hardly makes it violative of equal protection.

The judgment of the District Court is affirmed.

AFFIRMED.

KRIVOSHA, C.J., concurring in part, and in part dissenting.

While I generally concur with the majority's conclusion that establishing legislative criteria to control the transfer of water from the State of Nebraska to an adjoining state is not a violation of the commerce clause of the U.S. Constitution, I must respectfully dissent from that portion of the majority's opinion which holds that the statutory prohibition against the issuance of the permit, if the adjoining state does not grant reciprocity, is a constitutionally valid act of the Legislature. I believe that that portion of Neb. Rev. Stat. § 46-613.01 (Reissue 1978) which prohibits the Director of Water Resources from issuing a permit solely on the basis that the adjoining state does not grant reciprocity is an unreasonable classification and violates both the Constitution of the United States and the Constitution of the State of Nebraska.

Were the statute in question to provide that no person, firm, city, village, municipal corporation, or any other

entity, including a citizen of the State of Nebraska, could use water from this state on land owned by such entity in both this state and an adjoining state unless and until the Director of Water Resources found that the water request was reasonable, was not contrary to the conservation and use of ground water, and was not otherwise detrimental to the public welfare, I would have no difficulty with the statute. But the statute as it currently exists provides that even though the director might find that the request is reasonable and that to deny it would be unreasonable, that the request is not contrary to the conservation and use of ground water in this state and, to the contrary, is in furtherance of the conservation and use of ground water in this state, and that it is not otherwise detrimental to the public welfare, but in fact is beneficial to the public welfare, he, nevertheless, cannot issue such permit, solely on the basis that the adjoining state does not permit entities, including its own citizens, to transport water into this state.

The issue here is not whether reciprocal legislation is constitutional, but whether a citizen of the State of Nebraska can be prohibited from using water on land owned by that citizen in both this state and in an adjoining state solely on the basis that the adjoining state would not reciprocate. If one were to extend this statute to its logical conclusion, one could find that even though there was an abundance of water in an area in Nebraska, so much so that flooding was imminent, the water could not be transferred to adjoining land because the adjoining state refused to grant reciprocity. It occurs to me that what this statute attempts to do is to absolutely prohibit the transfer of water, without regard to its need or availability, based solely upon the acts of another state over which citizens of this state have no control.

To permit citizens of one part of the state to care for their land situated both in this state and an adjoining state because the adjoining state permits

reciprocity, though it may not have water which can be transferred, while denying that privilege to other citizens of this state solely on the basis of the action of an adjoining state and without regard to either the reasonableness of the prohibition at a particular moment or its need, strikes me as being a violation of Neb. Const. art. III, § 18, and art. I, § 3, and the fifth and fourteenth amendments to the U.S. Constitution. I would have struck down that portion of § 46-613.01 which denies authority to the director if the adjoining state does not otherwise grant reciprocity.

IRENE M. EICH, APPELLEE, V. STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, A FOREIGN CORPORATION, APPELLANT, AND DAVID J. WOJCIK, APPELLEE.

305 N.W.2d 621

Filed May 8, 1981. No. 43271.

1. **Insurance: Contracts: Joinder of Actions.** Under the provisions of Neb. Rev. Stat. §§ 25-701 and 25-702 (Reissue 1979), the joinder in a single action of the cause against the uninsured motorist with the insurer carrying the uninsured motorist coverage for the claimant is not permissible.
2. **Insurance: Contracts: Jury Instructions.** In a suit against the uninsured motorist, the amount of uninsured motorist coverage should not be disclosed to the jury.
3. **Insurance: Contracts.** The following exclusion in uninsured motorist coverage does not prevent the stacking of coverage where the insured has separate policies of uninsured motorist coverage on two or more vehicles: "(b) TO *BODILY INJURY* TO AN *INSURED* WHILE *OCCUPYING* OR THROUGH BEING STRUCK BY A LAND MOTOR VEHICLE OWNED BY THE NAMED INSURED OR ANY *RESIDENT* OF THE SAME HOUSEHOLD, IF SUCH VEHICLE IS NOT AN *OWNED MOTOR VEHICLE*," and the policy definition of owned motor vehicle includes the motor vehicle described in the declaration.
4. **Jury Verdicts.** Defects in a verdict which are matters of substance must be corrected before the jury is discharged. Neb. Rev. Stat. § 25-1123 (Reissue 1979).

Appeal from the District Court for Douglas County: JAMES A. BUCKLEY, Judge. Reversed and remanded for further proceedings.

Wayne J. Mark of Fraser, Stryker, Veach, Vaughn, Meusey, Olson and Boyer, P.C., for appellant.

Daniel G. Dolan for appellee Eich. No appearance for appellee Wojcik.

Heard before KRIVOSHA, C.J., BOSLAUGH, MCCOWN, CLINTON, BRODKEY, WHITE, and HASTINGS, JJ.

CLINTON, J.

Plaintiff Eich brought this action in the District Court for Douglas County, Nebraska, against State Farm Mutual Automobile Insurance Company and David J. Wojcik, an uninsured motorist, to recover damages for personal injuries received in a collision between an automobile driven by the plaintiff and one operated by Wojcik.

In order that the assignments of error hereinafter considered be seen in proper perspective, it is necessary to first summarize more of the background information than is ordinarily required.

State Farm insured the plaintiff's automobile and, in one or more other separate policies, other automobiles in the Eich household. The amended petition upon which the case was tried made the necessary allegations to state a cause of action against Wojcik founded upon his negligence, and further alleged the issuance of two policies of insurance by State Farm which provided uninsured motorist coverage for Eich.

State Farm filed a demurrer to the petition on the ground of misjoinder of causes of action and of parties defendant. This motion was overruled and State Farm was directed to answer.

State Farm, after first denying Wojcik's negligence and alleging contributory negligence on the part of the plaintiff, later filed an amended answer in which it admitted that Wojcik was negligent and

that such negligence was a proximate cause of the accident. It admitted the existence of one certain policy of insurance which afforded uninsured motorist coverage to Eich and admitted that Wojcik was an uninsured motorist. At the same time it filed an offer to confess judgment in the amount of $15,000.

Wojcik defaulted. However, in a deposition he admitted that he drove through a stop sign and collided with the Eich automobile and that he had been drinking at the time. This deposition was later received in evidence at the trial.

The court directed a verdict against Wojcik and State Farm on the issue of liability and left to the jury only the question of the amount of damages proximately caused by the collision. It instructed the jury that State Farm had in force at the time of the accident three policies of insurance under which it was obligated to pay all sums which the plaintiff had sustained as damages, not to exceed $45,000. It further instructed the jury that the amount of the insurance was not a factor to be considered by them in determining the amount of damages to which the plaintiff was entitled.

The form of the verdict prepared by the court for the use of the jury in rendering its verdict was in the following form: "We, the jury duly impaneled and sworn in the above entitled cause, do find for the said plaintiff and assess the amount of plaintiff's recovery as to defendant State Farm in the sum of $___, and as to defendant David J. Wojcik in the sum of $___."

The jury returned a verdict in which it placed in each of the blank spaces in the form the sum of $17,500. The jury was discharged on December 12, 1979. The court entered judgment on the verdict as follows: "Pursuant to verdict of December 12, 1979, ordered, that plaintiff have and recover from the defendants jointly and severally, the sum of $17,500.00, plus plaintiff's taxable costs."

On December 18, 1979, the plaintiff filed a motion in the following form: "Comes now the plaintiff and

respectfully requests the Court to correct a ministerial error of the judgment entry to accurately reflect the intentions of the jury as it was their intention to totally award the plaintiff the sum of $35,000.00 in damages for the injuries sustained as supported by the attached affidavit which is marked Exhibit 'A' and attached hereto." Exhibit A referred to in the motion was an affidavit of the foreman of the jury which stated that it was the intent of the jury panel to award the plaintiff the total amount of $35,000.

The plaintiff filed an alternative motion in the following form: "Comes now the plaintiff and alternatively requests the Court to reassemble the jury to correct or amend their verdict as to the form."

On December 27, 1979, the trial judge reassembled the jury, interrogated each of the jurors, and then entered the following order on the verdict form: "The court orders clerk to correct verdict form to read as follows: 'We, the jury duly impaneled and sworn in the above entitled cause, do find for the said plaintiff and assess the amount of plaintiff's recovery as to defendant State Farm in the sum of $35,000.00 and as to defendant David J. Wojcik in the sum of $35,000.00.' Pursuant to verdict, ordered, that judgment entered December 13, 1979, be and the same is hereby vacated. It is further ordered that the plaintiff have and recover from the defendants, jointly and severally, the sum of $35,000.00, plus plaintiff's taxable costs. Jurors are discharged. /s/ (Buckley)"

State Farm appeals to this court and urges, among other things, that the trial court erred: (1) In overruling the demurrer, based on misjoinder of causes of action and of defendants; (2) In instructing the jury on the policy limits; (3) In giving an instruction which permitted the "stacking" of three policies affording uninsured motorist coverage; and (4) In receiving the jurors' affidavits, and in reassembling the jury and entering a modified verdict.

We sustain the assignments in part, and reverse

and remand for a new trial on the issue of damages only.

We will discuss the claims of error in the order listed.

Could the plaintiff, under the Nebraska statutes governing joinder clauses, combine in one action her cause against her own insurer and the cause against the uninsured motorist? This question is presented to this court for the first time.

Because of inherent and unavoidable conflicts of interest which arise between the insured and the insurer where recovery is sought under uninsured motorist coverage, many procedural problems, including that related to joinder, arise. The courts of the various jurisdictions have not been able to resolve these problems in a uniform way. See Widiss, Uninsured Motorist Coverage §§ 7.2 to 7.15 (1969). Indeed, because of the unique nature of uninsured motorist coverage, it is difficult to resolve these problems by applying logic to established principle. Sometimes merely pragmatic solutions must be reached, and that is what we do in this case.

We conclude, for reasons hereinafter set forth, that the court erred in overruling the demurrer. However, we also conclude that, since there must be a retrial for other reasons and because liability has been admitted by State Farm and clearly established by the evidence against Wojcik, the error in joinder is essentially harmless because, on retrial, the cases may be separately docketed and retrial on the tort action will be on the issue of damages only.

Neb. Rev. Stat. §§ 25-701 and 25-702 (Reissue 1979) lay down the rules as to joinder of causes. Those sections permit joinder only within certain described classes, and with one exception not here applicable the causes united must affect all parties to the action and not require different places of trial. Insofar as the causes before us here are involved, the only classes described in the statute which we must consider are: "(1) The same transaction or transactions connected with the

same subject of action; (2) contracts, express or implied; (3) injuries with or without force . . . ." § 25-701.

The action against Wojcik clearly sounds in tort and comes within class (3). The cause of action against State Farm is clearly founded on contract and comes under class (2). Its contractual obligation depends, however, upon establishing Wojcik's tort liability. At least one court has held that joinder in cases such as this is permissible because the causes relate to the "same subject of action."

Section 25-702 lays down the further requirement that the causes of action so united must affect all the parties to the action. Although it is true that the action against Wojcik affects State Farm, the contractual action against State Farm does not directly affect Wojcik. See *Fuchs v. Parsons Constr. Co.*, 166 Neb. 188, 88 N.W.2d 648 (1958).

We hold that under the above statutes governing joinder, the joinder in a single action of the cause against the uninsured motorist with the insurer carrying the uninsured motorist coverage for the claimant is not permissible. *State ex rel. Cozean v. Meyer*, 449 S.W.2d 377 (Mo. App. 1969) (identical statute and the same relationship of the parties as in the case before us); *Wells v. Hartford Accident and Indemnity Company*, 459 S.W.2d 253 (Mo. 1970); *State v. James*, 263 S.W.2d 402 (Mo. 1953).

On remand, the plaintiff shall be permitted to file separate petitions, which shall be separately docketed under the provisions of Neb. Rev. Stat. § 25-809 (Reissue 1979), and the causes shall proceed without further service.

This opinion should not be understood to hold that the insured may never sue his insurance company without having first obtained a judgment against the uninsured motorist. There are probably instances in which the tort liability may be determined in an action against the insurance carrier, e.g., under "hit-and-run" coverage or in cases where service cannot

be obtained on the uninsured motorist.

As already noted, however, the error in refusing to overrule the demurrer does not require a retrial on all issues. Any prejudice resulting from the prior joinder may be cured simply by trying the damage issue only in the cause against Wojcik. The direction of the verdict on liability against Wojcik was correct. The insurer had its day in court on that issue. The interest of the insurer on the damage issue may properly be protected by its intervention in that action. This court long ago established the method by which the insurer's interest may be protected, and that is by intervention. *Heisner v. Jones*, 184 Neb. 602, 169 N.W.2d 606 (1969). The cause can be retried without disclosing to the jury the insurer's participation in the trial. The court should not instruct the jury as to the existence of the liability insurance or the monetary limits of coverage. *Walls v. Horbach*, 189 Neb. 479, 203 N.W.2d 490 (1973).

Did the District Court err in permitting the uninsured motorist coverage in each of the three policies in which plaintiff was an insured to be "stacked"?

Coverage U of the State Farm policy provided: "To pay all sums which the *insured* or his legal representative shall be legally entitled to recover as damages from the owner or operator of an *uninsured motor vehicle* because of *bodily injury* sustained by the *insured*, caused by accident and arising out of the ownership, maintenance or use of such *uninsured motor vehicle* . . . ." Then follow provisos which require the issues of liability and damages to be determined by submitting to arbitration if agreement cannot be made between the insured and the claimant; that judgment against an uninsured motorist is not conclusive against the company; and a requirement that consent of the company be obtained before the claimant can sue the uninsured motorist. All of these provisos we held void in *Heisner v. Jones*, *supra*. Then followed various exclusions, among which is the following: "(b) TO *BODILY INJURY* TO AN *INSURED* WHILE

OCCUPYING OR THROUGH BEING STRUCK BY A LAND MOTOR VEHICLE OWNED BY THE NAMED INSURED OR ANY *RESIDENT* OF THE SAME HOUSEHOLD, IF SUCH VEHICLE IS NOT AN *OWNED MOTOR VEHICLE.*" Owned motor vehicle, as used in the exclusion, is defined as meaning "the motor vehicle . . . described in the declarations . . . ." The remainder of the definition is not relevant to the question before us.

Neb. Rev. Stat. § 60-509.01 (Reissue 1978) requires that all policies issued contain uninsured motorist coverage. The statute, however, gives the insured the option to reject such coverage.

In support of its position, State Farm relies upon our holdings in *Shipley v. American Standard Ins. Co.*, 183 Neb. 109, 158 N.W.2d 238 (1968), and *Herrick v. Liberty Mut. Fire Ins. Co.*, 202 Neb. 116, 274 N.W.2d 147 (1979). In *Herrick*, the exclusion was as follows: "Exclusions This policy does not apply: * * * Under the Uninsured Motorists Coverage, (q) to bodily injury to an insured while occupying a highway vehicle (other than an insured automobile) owned by the named insured or by any person resident in the same household who is related to the named insured by blood, marriage or adoption, or through being struck by such a vehicle; * * *." In *Shipley*, the exclusion was of similar import. In both of the above cases the insured claimant was operating an owned uninsured motorcycle. In the first case, the claimant owned an insured automobile. In the second, the claimant was an insured in an automobile owned by his parents. Policies in both cases included uninsured motorist coverage. We there upheld the exclusion. The rationale is expressed in the following language from *Herrick*, *supra* at 119, 274 N.W.2d at 149: "It is difficult to find a policy in the statute to protect one uninsured motorist from another uninsured motorist. This is what the Shipley case referred to when it stated: 'An overriding public policy of protecting an owner-operator who inexcusably has

no applicable bodily injury liability coverage is not presently discernible.'

"In Holcomb v. Farmers Ins. Exchange, 254 Ark. 514, 495 S.W.2d 155, the court stated: 'It is a matter of common knowledge that in most automobile use related injuries two automobiles and drivers are involved. Under the broad coverage insisted on by the appellants, by the purchase of single coverage on one automobile an owner could protect himself and his entire family against financial loss caused by uninsured motorists while each of them are themselves driving uninsured . . . automobiles.'"

We believe the controlling decisions of this court are *Bose v. American Family Mut. Ins. Co.*, 186 Neb. 209, 181 N.W.2d 839 (1970); *Protective Fire & Cas. Co. v. Woten*, 186 Neb. 212, 181 N.W.2d 835 (1970).

The language of the exclusion in the case before us is somewhat different from that in *Protective Fire, supra*, and *Bose, supra*, in that it defines owned automobile as one described in the declarations, while in the two above cases the policy referred to an owned automobile (other than an insured automobile).

It is to be noted that in the present case the automobiles are each automobiles described in the declaration of the policy covering the particular vehicle. Each, therefore, was an insured automobile. A premium was paid in each case for uninsured motorist coverage. Had the plaintiff been a pedestrian struck by an uninsured motorist, she would clearly have had coverage under each of the three policies. Logically, State Farm's argument would, in that case, mean that the plaintiff had to elect, when she filed suit, the policy under which she wanted to be covered. We think that *Bose, supra*, and *Protective Fire, supra*, in principle cover the present case.

In *Protective Fire, supra*, the deceased was a guest passenger in an insured automobile. The deceased claimant also had uninsured motorist coverage by reason of being an insured in the policy covering the

family car. In *Bose, supra*, the two claimants were both covered by insurance on two family cars, each in a separate policy. The sum of the damages for personal injuries suffered by each claimant exceeded the minimum coverage afforded to each ($10,000) by a single policy. The defense was "the excess escape" clause. We held it did not apply and permitted recovery under both policies.

Our holding in *Pettid v. Edwards*, 195 Neb. 713, 240 N.W.2d 344 (1976), is, in my judgment, logically irreconcilable with *Bose, supra*, and *Protective Fire, supra*. Nonetheless, even if we adhere to the distinction there made, i.e., multiple car coverage in a single policy as opposed to multiple car coverage in separate policies, that case would not govern here.

The final assignment of error pertains to the reassembling of the jury after its discharge, interrogation of the jury by the judge as to the verdict it intended to render, and modification of the verdict by the judge based upon the interrogation.

Neb. Rev. Stat. § 25-1123 (Reissue 1979) provides: "The verdict shall be written, signed by the foreman, and read by the clerk to the jury, and the inquiry made whether it is their verdict. If any juror disagree, the jury must be sent out again; but if no disagreement be expressed, and neither party requires the jury to be polled, the verdict is complete, and the jury discharged from the case. If, however, the verdict be defective in form only, the same may, with the assent of the jury before they are discharged, be corrected by the court."

This court has long held, without reference to the foregoing statute, that where a defect in a verdict is in form only, the court may direct the jury to amend it, or it may be amended by the court without the consent of the jury before it is discharged. *Davis v. Neligh*, 7 Neb. 78 (1878). Defects which are matters of substance must be corrected before the jury is

discharged. *Forslund v. Swenson*, 110 Neb. 188, 192 N.W. 649 (1923).

It is clear that the amendment in this case was more than a matter of form. It was one of substance. It related to the amount of the verdict against defendants and whether the verdict was several or a joint judgment for a single amount. The plaintiff's claim against the uninsured motorist personally is not limited to the amount of uninsured motorist coverage under his own policy. The liability of the insurer, of course, is limited by the amount of the coverage, as well as by the damages determined to have been actually incurred. It is true, of course, that generally speaking a verdict against the uninsured motorist for more than the amount of the uninsured motorist coverage is uncollectable. However, that is not a limitation on the rights of the claimant against the tort-feasor.

Other jurisdictions under identical or virtually identical statutes have held that, after acceptance of a jury verdict and discharge of the jury, the court is without authority to change the verdict. *M & P Stores v. Taylor*, 326 P.2d 804 (Okla. 1958); *Quarring v. Stratton*, 85 Wash. 333, 148 P. 26 (1915). See, also, *Chicago, Rock Island and Pacific Railroad Co. v. Speth*, 404 F.2d 291 (8th Cir. 1968).

The judgment is reversed and the cause remanded for further proceedings in accordance with this opinion.
REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

BOSLAUGH and WHITE, JJ., concur in result.

KRIVOSHA, C.J., concurring in result.

I concur in the result reached by the majority in this case. I believe, however, that much of the difficulty and confusion which cases of this type create could easily be resolved if we would simply recognize the reality of the matter and permit the insured under an "uninsured motorist" policy provision to directly sue its insurance carrier on the basis that the action really is one arising out of contract, though the right to actually

recover and the amount of recovery is based upon another's negligence. To suggest that we must not utter the words "insurance company" else unsuspecting jurors will reject their statutory duty and cease to be fair and impartial is unsupported in fact and serves no useful purpose.

The inconsistency of the matter is made even clearer when we recognize that we permit the carrier to intervene at *its* discretion, though we must not explain to the jury who the intervenor is or who it is that its counsel represents. The justification for permitting the carrier to intervene is founded upon the provisions of Neb. Rev. Stat. § 25-328 (Reissue 1979) which permit any person who has or claims an interest in the matter in litigation to join either the plaintiff or the defendant. I am, however, unable to find any language in that statute which says that once a party has made that election it may remain anonymous throughout the trial. I acknowledge that that has been our practice; I simply question the authority for doing it.

Those jurisdictions which have simply faced up to the issue appear not to have suffered any significant dire consequences.

The majority suggests that there may be instances where such action as proposed here might be appropriate, such as in the case of "hit-and-run" drivers. I do not perceive the basis for having two rules; one when the negligent driver is known and another when unknown.

VILLAGE OF MCGREW, A MUNICIPAL CORPORATION, APPELLEE, V. ROGER STEIDLEY, APPELLANT.

305 N.W.2d 627

Filed May 8, 1981. No. 43305.

1. **Municipal Corporations: Zoning Powers.** Zoning powers granted to villages under Neb. Rev. Stat. § 19-901 (Reissue 1977) shall be exercised only after the municipal legislative body has appointed a planning commission, received from its planning commission a recommended comprehensive development plan as defined in Neb. Rev. Stat. § 19-903 (Reissue 1977), adopted such comprehensive development plan, and received the specific recommendation of the planning commission on the adoption or amendment of zoning regulations.
2. **Comprehensive Development Plans.** A comprehensive development plan as defined in Neb. Rev. Stat. § 19-903 (Reissue 1977) includes: (1) A land-use element which designates the proposed general distributions, general location, and extent of the uses of land for agriculture, housing, commerce, industry, recreation, education, public buildings and lands, and other categories of public and private use of land; (2) The general location, character, and extent of existing and proposed major roads, streets, and highways, and air and other transportation routes and facilities; and (3) The general location, type, capacity, and area served of present and projected or needed community facilities including recreation facilities, schools, libraries, other public buildings, and public utilities and services.
3. **Municipal Corporations: Public Meetings.** While the right of a municipal governing body to amend its minutes is very broad in cases where, through inadvertence or misapprehension, a record has been made up defectively, the power of a governing body to amend its minutes is not unlimited or unqualified. The rule permitting an amendment of the minutes should be administered with caution, and the effect of omissions or irregularities in the proceedings of the council cannot be avoided under the guise of correction of the records. Corrections made in the minutes or records of a municipal governing body should be made within a reasonable time.
4. **Public Meetings.** The purpose of a nunc pro tunc correction is to make the record speak the truth. Its purpose is not to correct oversights or failures in the performance of mandatory acts.

Appeal from the District Court for Scotts Bluff County: ALFRED J. KORTUM, Judge. Reversed and remanded with instructions.

Holtorf, Kovarik, Nuttleman & Ellison, P.C. and

James M. Mathis and Alan D. Carlson for appellant.

Philip M. Kelly of Winner, Nichols, Meister & Douglas for appellee.

Heard before KRIVOSHA, C.J., BOSLAUGH, MCCOWN, BRODKEY, WHITE, and HASTINGS, JJ.

BRODKEY, J.

Roger Steidley, defendant and appellant herein, appeals to this court from a decree entered by the District Court of Scotts Bluff County, Nebraska, enjoining him from maintaining a mobile home on property located in the Village of McGrew, Nebraska. The court ordered the defendant to comply with village ordinance No. 44, a zoning ordinance, which specifies certain requirements for the installation and maintenance of mobile homes within McGrew. We reverse and remand.

McGrew, Nebraska, is a rural community of approximately 85 people located along the North Platte River 20 miles southeast of Scottsbluff. It appears that on August 5, 1976, the village board of McGrew met to organize a planning commission for the village in order to investigate and develop plans for the long-term growth of the community. The planning commission members were appointed by the village board, and a map of McGrew was forwarded to the State Office of Planning and Programming so it could aid in the completion of the project. Various work sessions followed in which the planning commission considered alternative plans for development and village regulations.

The planning commission drafted and approved a comprehensive development plan which, after a public hearing, was recommended to the village board for adoption. The certificate of the planning commission, dated May 9, 1977, and received in evidence at the trial of this matter, recites: "The Planning Commission of the Village of McGrew, Nebraska,

hereby recommends to the Village Board of McGrew, Nebraska, the acceptance of the Comprehensive Plan and adoption by the Village Board. The Comprehensive Plan shall be known as 'The Comprehensive Plan for McGrew, Nebraska.' The Planning Commission held a public hearing on May 9, 1977 in the Fire Hall in McGrew, Nebraska, and by a roll call vote of 6 ayes and 0 nays voted to accept the Comprehensive Plan and recommend to the Village Board of McGrew, Nebraska." However, as reflected by the minutes of that meeting, the actual motion made and passed by the members of the planning commission was "to pass the Comprehensive Plan of *Zoning* Regulations on to the Village Board. . . ." (Emphasis supplied.) The comprehensive development plan itself, entitled Community Development Plan, was introduced at the trial as exhibit 4. Exhibit 4 contains not only the comprehensive development plan, which complied in full with the requirements of such plans as set out in Neb. Rev. Stat. § 19-903 (Reissue 1977), but also contains the zoning regulations which were the subject matter of ordinance No. 44, admitted as exhibit 1 at trial. Exhibit 1, however, as adopted by the Village of McGrew, was entirely a zoning ordinance and does not contain the development plan recommended by the planning commission. The minutes of the village board meeting held on July 6, 1977, indicate that the board approved by rollcall vote the proposed zoning regulations as village ordinance No. 44. The minutes do not reflect that any action whatsoever was taken with regard to that part of exhibit 4 which constituted the comprehensive development plan prepared by the planning commission.

On Sunday, July 10, 1977, 4 days after the village board adopted ordinance No. 44, defendant Steidley brought a 70-foot-long mobile home into the Village of McGrew, and placed it crosswise on three lots, each of which measured 25 feet in width and 133 feet in depth. It appears that Steidley had tied down

and blocked the mobile home foundation, hooked up the utilities, and had placed a skirt on the backside of the home by July 12, 1977, when he was advised by William Van Pelt, chairman of the village board, that he had not positioned the mobile home in accordance with the requirements set forth in ordinance No. 44. Steidley testified, however, that he had previously been told by other members of the board that his mobile home could be placed on the lots as he had positioned it and that no ordinances or regulations had been passed with regard to its placement.

On March 3, 1978, the Village of McGrew filed a petition in the District Court of Scotts Bluff County, praying that "the Defendant be enjoined from maintaining his mobile home on the premises described herein in violation of the ordinances of the Village of McGrew and that a mandatory injunction issue requiring him to remove the same or to position the mobile home in compliance with and to construct the foundation and tie-downs for the same in compliance with the ordinances of the Village of McGrew, for the cost of this action and for such other and further relief as the Court may deem just and equitable." In his answer, filed March 21, 1978, the defendant challenged the validity of ordinance No. 44, and the proceedings of the planning commission and village board which culminated in its enactment.

This matter came to trial on November 29, 1979. The record reveals, however, that the evening before the trial was to commence, to wit, on November 28, 1979, a special meeting of the village board of McGrew was held, at which meeting a resolution was adopted to amend the minutes of the July 6, 1977, meeting to read as follows: "A motion was made to adopt the Comprehensive Development Plan for the Village of McGrew. Motion approved by roll call vote." At the trial, which commenced the following day, the Village of McGrew called as its first witness Katherine Teppert, who was the village clerk for the Village of

McGrew. She testified with reference to the organization of the planning commission on August 5, 1976, and the adoption of the comprehensive plan by the planning commission and the recommendation to the village board that they accept the comprehensive plan, on May 9, 1977. She also testified with reference to the meeting held on July 6, 1977, as follows: "In July we held a meeting where we passed the Comprehensive Plan and the zoning regulations for the village and adopted them." She was asked whether there was an error in the minutes of the meeting of July 6, 1977, and replied that there was and that the minutes should have read "Comprehensive Planning and Zoning" instead of just "Comprehensive Zoning." She also testified that the village board had taken action to correct the minutes; and when asked when that action was taken, replied: "Last night, November 28th." She testified as to the previous evening as follows: "We had a motion to amend the July 6th minutes and we amended them to read that the motion was made and approved to accept both the planning and the zoning regulations." We point out that the actual minutes do not bear out this statement. As quoted above, they merely refer to adopting the "Comprehensive Zoning Ordinance." She later testified, however, that it was her recollection that the "Comprehensive Plan was adopted by the Village." She later identified this plan as exhibit 4, which she contended was adopted on July 6, 1977. She also identified exhibit 1, ordinance No. 44, which she stated was the comprehensive plan for the Village of McGrew regulating and restricting certain ordinances. She was specifically asked: "Is that the Comprehensive Zoning Plan?" She replied: "Yes, it is." However, the minutes of the meeting of the village board which was held on July 6, 1977, are also in evidence in this case, and they reveal that at the meeting a motion was made and seconded to accept the "Comprehensive Zoning Ordinance for the Village of McGrew," which

they referred to in said minutes as "ordinance 44." The motion was approved by rollcall vote. Nothing was specifically referred to in the minutes of that meeting with regard to that portion of exhibit 4 which constitutes the comprehensive development plan.

Following the trial, at which Katherine Teppert, the village clerk, William Van Pelt, the chairman of the board, and Roger Steidley, the defendant, testified on behalf of the plaintiff, and no witnesses testified on the behalf of the defendant, the trial court, on December 10, 1979, found generally in favor of the plaintiff and against the defendant, and ordered that the defendant be enjoined from further violations of ordinance No. 44 of the Village of McGrew and from maintaining a mobile home on the property in question unless, within 60 days of the decree, he relocated the mobile home to comply with the setback requirements set forth in ordinance No. 44, and otherwise complied with the requirements of that ordinance.

In his brief on appeal, the defendant contends that since the trial court found generally in favor of the village, it necessarily had to find against the defendant on each issue raised by the trial below. Specifically, the defendant principally assigns as error: (1) The trial court erred in finding that ordinance No. 44 was a comprehensive development plan within the meaning of § 19-903; (2) The court erred in finding that the village had adopted a comprehensive development plan prior to attempting to exercise the zoning regulations; (3) The court erred in finding that ordinance No. 44 was a valid comprehensive development plan, because the words "development plan" were not included in its title; (4) The court erred in finding that ordinance No. 44 had been validly adopted, because it was not styled as required by Neb. Rev. Stat. § 17-613 (Reissue 1977); (5) The court erred in failing to find that ordinance No. 44 did not become effective until after defendant's mobile home was placed in its present position, and (6) The court erred in failing

to find that the ordinance had not been published as provided by law.

We begin our discussion of this matter by setting forth the applicable law governing the scope of our review on appeal. This court has held that what is in the public good as it relates to zoning ordinances affecting the use of property is, primarily, a matter lying within the discretion of the municipal body to which the power and function of zoning is committed; and that unless an abuse of this discretion has clearly been shown, it is not the province of this court to interfere. In passing upon the validity of zoning ordinances, an appellate court should give great weight to the determination of local authorities who are especially familiar with local conditions. However, in appeals from the District Court to the Supreme Court in suits in equity, on trial de novo this court will retry the issue or issues of fact involved and reach an independent conclusion as to what findings are required under the pleadings and the evidence, without reference to the conclusions reached in the District Court. *Dundee Realty Co. v. City of Omaha*, 144 Neb. 448, 13 N.W.2d 634 (1944); *Weber v. City of Grand Island*, 165 Neb. 827, 87 N.W.2d 575 (1958); *Bucholz v. City of Omaha*, 174 Neb. 862, 120 N.W.2d 270 (1963); *J. W. Auto Parts, Inc. v. City of Omaha*, 187 Neb. 624, 193 N.W.2d 281 (1971).

In order for this court to make the determination as to whether the Village of McGrew properly enacted ordinance No. 44, we must turn to the applicable statutory provisions which govern the matter before us. In this regard, Neb. Rev. Stat. § 19-901 (Reissue 1977) specifies the requirements for enacting zoning regulations as follows: "(1) For the purpose of promoting health, safety, morals, or the general welfare of the community, the legislative bodies in cities of the first and second class and in villages may adopt zoning regulations which regulate and restrict the height, number of stories, and size of buildings and

other structures, the percentage of lot that may be occupied, the size of yards, courts and other open spaces, the density of population, and the location and use of buildings, structures and land for trade, industry, residence or other purposes.

"(2) Such powers shall be exercised *only after the municipal legislative body has appointed a planning commission, received from its planning commission a recommended comprehensive development plan as defined in section 19-903, adopted such comprehensive development plan, and received the specific recommendation of the planning commission on the adoption or amendment of zoning regulations.*" (Emphasis supplied.)

It is clear from the language found in § 19-901 that a comprehensive *development* plan (as defined in § 19-903) must precede the adoption of any zoning regulations by the village. We note that prior to 1967, neither § 19-901 nor § 19-903 contained the requirement that a comprehensive development plan be adopted by a community prior to enacting zoning regulations; rather, the statute only required that zoning regulations be made "in accordance with a comprehensive plan." See *City of Imperial v. Raile*, 187 Neb. 404, 191 N.W.2d 442 (1971). However, § 19-901 was amended in 1967, and now includes the requirement that a comprehensive *development* plan be adopted *before* the passage of any zoning regulations.

We must therefore turn to § 19-903 in order to determine whether the "Comprehensive Zoning Ordinance," adopted by the Village of McGrew as ordinance No. 44, constitutes a comprehensive *development* plan. Section 19-903 states as follows: "The regulations and restrictions authorized by sections 19-901 to 19-915 shall be made in accordance with a comprehensive development plan which shall consist of both graphic and textual material and shall be designed to accommodate anticipated long-range

future growth which shall be based upon documented population and economic projections. *The comprehensive development plan shall, among other possible elements, include:* (1) A land-use element which designates the proposed general distributions, general location, and extent of the uses of land for agriculture, housing, commerce, industry, recreation, education, public buildings and lands, and other categories of public and private use of land; (2) The general location, character, and extent of existing and proposed major roads, streets, and highways, and air and other transportation routes and facilities; and (3) The general location, type, capacity, and area served of present and projected or needed community facilities including recreation facilities, schools, libraries, other public buildings, and public utilities and services." (Emphasis supplied.)

Our review of ordinance No. 44, the "Comprehensive Zoning Plan" enacted by the Village of McGrew, convinces us that it does not contain those elements of a comprehensive development plan set forth in § 19-903(1) to (3). Rather, the ordinance states on its face: "AN ORDINANCE ESTABLISHING A COMPREHENSIVE *ZONING* PLAN WITHIN THE VILLAGE OF McGREW, NEBRASKA; AND WITHIN THE CORPORATE LIMITS OF SAID VILLAGE, *REGULATING AND RESTRICTING SIZE OF BUILDINGS AND OTHER STRUCTURES, THE SIZE OF THE YARDS, COURTS AND OTHER OPEN SPACES, THE DENSITY OF THE POPULATION AND THE LOCATIONS AND USE OF BUILDINGS, STRUCTURES AND LAND FOR TRADE, INDUSTRY, RESIDENCE AND OTHER PURPOSES;* ESTABLISHING SET-BACK BUILDING LINES; DIVIDING SAID VILLAGE INTO ZONING DISTRICTS AND WITHIN SUCH DISTRICTS REGULATING AND RESTRICTING ERECTION, CONSTRUCTION, RECONSTRUCTION, ALTERATION, SIZE, REPAIR AND USE

OF BUILDINGS, STRUCTURES AND LAND; PROVIDING THE PROCEDURE FOR THE ISSUANCE OF BUILDING PERMITS AND CERTIFICATE OF OCCUPANCY, PROVIDING FOR ENFORCEMENT OF SAID ORDINANCE AND PRESCRIBING PENALTIES FOR ITS VIOLATION." (Emphasis supplied.)

We note that the above italicized language taken from ordinance No. 44 comes verbatim from § 19-901, the statutory section governing the adoption of zoning ordinances and regulations. Ordinance No. 44 obviously fails to meet the statutory requirements set forth in § 19-903, and therefore cannot be considered to be a comprehensive *development* plan. Therefore, inasmuch as no comprehensive development plan was adopted by the Village of McGrew prior to the enactment of ordinance No. 44, as is required by § 19-901(2), we must conclude that ordinance No. 44 was not properly adopted as a zoning ordinance by the village board and is invalid under the terms of the aforementioned statutory provisions.

We now comment briefly upon the effect of the effort of the village board of McGrew to amend the minutes of the meeting held on July 6, 1977, to show that the board also adopted the comprehensive development plan at that meeting. The minues of the meeting held on that date do not reflect that the comprehensive development plan was adopted, but show that the comprehensive zoning plan was so adopted. We again point out that the special meeting to correct the minutes of the earlier meeting was held the night before the trial in this matter was to commence, which date was approximately 2 years and 4 months after the aforementioned meeting of the village board which adopted the comprehensive zoning plan. The general rules with reference to the right of a municipal governing body to amend its minutes of previous meetings is summarized in 62 C.J.S. *Municipal Corporations* § 409 d at 782-83, as

follows:

"The right of a municipal governing body to amend its minutes is very broad, at least in cases where, through inadvertence or misapprehension, a record has been made up defectively; . . . The power of the governing body to amend its minutes, however, is not unlimited or unqualified. The rule permitting an amendment of the minutes should be administered with caution, and the effect of omissions or irregularities in the proceedings of the council cannot be avoided under the guise of correction of the records. . . .

"If a correction is made in the minutes or records of a municipal governing body it should be made within a reasonable time. . . . A nunc pro tunc entry may be made on the minutes of a succeeding meeting; but in order for minutes to be amended nunc pro tunc the amendment must be based on written or other sufficient data of record, which must be such as itself to furnish evidence that the particular proceedings in fact took place." In this connection, see *Beverly Land Co. v.City of South Sioux City*, 117 Neb. 47, 219 N.W. 385 (1928).

The case of *City of Valentine v. Valentine Motel, Inc.*, 176 Neb. 63, 125 N.W.2d 98 (1963), involved the question of the power of a city council to amend its minutes nunc pro tunc, after the commencement of litigation, for the purpose of complying with the requirements of the applicable annexation statutes, which among other things required that to annex such territory the resolution and vote thereon "shall be spread upon the records of the council or board." In that case the court held that that requirement was a condition precedent which must be strictly complied with, and that the requirement that the record be kept and spread upon the records of the council at the time of its voting on the resolution was mandatory and jurisdictional in character. The court recognized the general rule that a city council may, under some circumstances, correct its own

records, nunc pro tunc, to show the adoption of a resolution or ordinance and to record the truth of how it was voted upon; but that it may not by such action show that the separate requirement that the action be spread upon the record of the minutes of the council was performed prior to the time that the spreading upon the minutes actually took place. In its opinion, this court stated at 68-69, 125 N.W.2d at 102: "We point out that on January 8, 1962, the next council meeting following December 11, 1961, the minutes were recorded and approved 'as written.' Apparent is the square application of the principles above announced. A property owner in the area to be annexed, or any interested citizen inspecting this public record, would be entitled to rely on the law and facts as then represented, and act accordingly on the basis that there was no legal adoption of the annexation resolution. To permit the *recording* of the fact of passage at a later time and for the purposes of litigation would be to permit the violation of the disclosure requirement of the statute as a condition precedent to annexation proceedings, would affect intervening rights of interested parties, and would open up an opportunity for fraud and uncertainty as to something that the very requirement of the statute was designed to prevent."

Also, in *Payne v. Ryan*, 79 Neb. 414, 417, 112 N.W. 599, 600 (1907), which case involved an application to a village board for a license to sell intoxicating liquors in the village, this court stated: "Appellee undertook to avoid the force of the record of the board of trustees relating to the attempted passage of the ordinance in question. Several days after the hearing before the village board, and after it had ordered the license to issue, a special meeting of the village board was called, and it proceeded to enter a *nunc pro tunc* order, whereby it caused a record to be made supplying the omissions in the record relative to the passage of the ordinance in question, notwithstanding that

15 years had elapsed since the attempted passage of the ordinance." The court held that under the evidence offered and adduced at the hearing the village of Exeter, at the time of the granting of the license, did not have any village ordinance authorizing the issuance of a license, and that the village board was therefore without power to issue the license.

Finally, in our recent case of *State ex rel. Schuler v. Dunbar*, *ante* p. 69, 74, 302 N.W.2d 674, 678 (1981), we stated: "The purpose of a nunc pro tunc correction is to make the record speak the truth. Its purpose is not to correct oversights or failures in the performance of mandatory acts," citing *Beverly Land Co. v. City of South Sioux City*, *supra;* and *City of Valentine v. Valentine Motel, Inc.*, *supra.*

From our examination of the record, we are convinced that the Village of McGrew did not adopt the comprehensive development plan at or prior to the meeting of July 6, 1977, as required by the statutes of this state, before the enactment of zoning regulations, and that its efforts to do so by amending the minutes of that meeting 2 years and 4 months after such meeting, on the evening prior to trial, was a valiant but futile effort to correct the deficiency in its zoning ordinance.

In view of our conclusions as expressed above, both that ordinance No. 44 was a zoning ordinance and not a comprehensive development plan, and also that no comprehensive development plan was enacted by the Village of McGrew prior to the adoption of its zoning ordinance, we need not consider other assignments of error alleged by the defendant in his brief on appeal. We conclude that the decree of the District Court, enjoining the defendant from maintaining his mobile home on the property in question, must be reversed and the cause remanded with instructions to dismiss the plaintiff's petition.

REVERSED AND REMANDED WITH INSTRUCTIONS.

CLINTON, J., participated on briefs.

BOSLAUGH, MCCOWN, and CLINTON, JJ., concur in result.

KRIVOSHA, C.J., concurring in result.

I concur in the result reached by the majority in this case. I take a moment to write a separate concurring opinion so that the basis for my action in this case may be clear. I am in full accord with the majority's conclusion that the document considered by the village board of the Village of McGrew and approved by it at its meeting on July 6, 1977, was proposed zoning regulations and not a comprehensive development plan required to be adopted prior to the adoption of a zoning ordinance. Having reached that conclusion, I believe that the balance of the majority's opinion is mere dictum and may in fact cause some unnecessary confusion in the future.

The majority, in reaching its conclusion that the zoning regulations were improperly adopted, cites *Beverly Land Co. v. City of South Sioux City*, 117 Neb. 47, 219 N.W. 385 (1928), and *City of Valentine v. Valentine Motel, Inc.*, 176 Neb. 63, 125 N.W.2d 98 (1963). For reasons more particularly set out in my dissent in the case of *State ex rel. Schuler v. Dunbar*, *ante* p. 69, 302 N.W.2d 674 (1981), I believe that neither the *Beverly Land Co.* case nor the *City of Valentine* case is correct. They should not be followed, except with regard to those statutes which specifically provide that the manner of recording the minutes is a prerequisite to subsequent action to be taken by a governmental subdivision, such as that of an annexation. Such is not the case here. While I agree that the function of nunc pro tunc is to make the record speak the truth and not to correct oversights or failures, I do not believe that there is any time limit when such a correction may be entered. The effect of correcting the record may depend upon whether any intervening interests have accrued. That is not the same as saying that a record may not be corrected to honestly speak the

truth. When a record is so corrected, it dates back to the date the action was taken and should not be disregarded.

ELMER SALTZ, APPELLANT, V.
SCHOOL DISTRICT OF NORFOLK, IN THE COUNTY OF MADISON, IN THE STATE OF NEBRASKA, A POLITICAL SUBDIVISION, APPELLEE.

305 N.W.2d 635

Filed May 8, 1981. No. 43311.

Commission of Industrial Relations: Jurisdiction. The Commission of Industrial Relations' authority to resolve disputes concerning terms, tenure, or conditions of employment is limited to situations in which the parties have not yet reached agreement. Once an agreement is reached and a subsequent breach is alleged to have occurred, the parties are required to litigate their dispute in a competent court having jurisdiction of the matter.

Appeal from the Commission of Industrial Relations. Affirmed.

Theodore L. Kessner and Mark D. McGuire of Crosby, Guenzel, Davis, Kessner & Kuester for appellant.

Jewell, Otte, Gatz, Collins & Domina for appellee.

Heard before KRIVOSHA, C.J., BOSLAUGH, MCCOWN, CLINTON, BRODKEY, WHITE, and HASTINGS, JJ.

CLINTON, J.

This is an appeal from the Commission of Industrial Relations. The plaintiff, Elmer Saltz, is a certificated teacher employed by the School District of Norfolk, in the County of Madison, in the State of Nebraska. During the 1978-79 contract year, the plaintiff's employment was governed by the terms and conditions of an agreement negotiated by the labor organization, of which he was a member, and the school district.

The plaintiff filed a petition with the Commission of Industrial Relations in which he sought an order of the

CIR finding that he was entitled to 1 day of paid personal leave taken in accordance with the negotiated personal leave policy of the school district, and for an order directing the school district to pay to the plaintiff 1/186th of his 1978-79 salary allegedly wrongfully withheld as a result of the school district denying a day of paid personal leave. He also sought an order directing the school district to remove from his personnel file a letter of reprimand. Personal leave policy was governed by the terms of the negotiated labor agreement.

The CIR dismissed the action because it did not have jurisdiction under our holding in *Transport Workers of America v. Transit Auth. of City of Omaha*, 205 Neb. 26, 286 N.W.2d 102 (1979). The plaintiff appeals to this court and urges that *Transport Workers of America* be overruled. Among other arguments made, the plaintiff points out that in the case of *Minshull v. School Dist. of Sutherland*, 198 Neb. 418, 253 N.W.2d 45 (1977), this court affirmed a judgment of the CIR involving a matter similar to that here involved and in principle the same. We simply point out that in *Minshull*, no jurisdictional question or issue as to the definition of industrial dispute was raised by the parties and that decision preceded our decision in *Transport Workers of America*.

In *Transport Workers of America* we held: "The Commission of Industrial Relations' authority to resolve disputes concerning terms, tenure, or conditions of employment is limited to situations in which the parties have not yet reached agreement. Once an agreement is reached and a subsequent breach is alleged to have occurred, the parties are required to litigate their dispute in a competent court having jurisdiction of the matter." (Syllabus of the court.)

We adhere to that holding. The order of the Commission of Industrial Relations dismissing the plaintiff's petition is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. JERRY G. OHLER, APPELLANT.

305 N.W.2d 637

Filed May 8, 1981. No. 43375.

1. **Constitutional Law: Search and Seizure.** The capacity of a person to claim the protection of the fourth amendment depends not upon a property right in the invaded place, but upon whether the person who claims the protection of the amendment has a legitimate expectation of privacy in the invaded place.
2. **Search and Seizure.** A person cannot assert any expectation of privacy in an area in which he gave governmental officials the permission to inspect.
3. ——. The question as to whether or not consent to search was freely and intelligently given is a question of fact to be determined from the totality of all the circumstances surrounding such search.
4. **Appeal and Error: Evidence.** This court will not interfere with a conviction based on evidence unless it is so lacking in probative force that as a matter of law it can be said that it is insufficient to support a verdict of guilt beyond a reasonable doubt.

Appeal from the District Court for York County: WILLIAM H. NORTON, Judge. Affirmed.

Anthony S. Troia and Alan J. Crivaro of Troia Law Offices, P.C., for appellant.

Paul L. Douglas, Attorney General, and Linda A. Akers for appellee.

Heard before KRIVOSHA, C.J., BOSLAUGH, MCCOWN, BRODKEY, WHITE, and HASTINGS, JJ.

PER CURIAM.

The defendant, Jerry G. Ohler, was convicted by a York County District Court jury of a violation of Neb. Rev. Stat. § 28-508(1) (Reissue 1979), possession of burglary tools, a felony, and of a violation of Neb. Rev. Stat. § 28-511(1) (Reissue 1979), possession of stolen property, a misdemeanor. Ohler further was found to be an habitual criminal pursuant to Neb. Rev. Stat. § 29-2221 (Reissue 1979). He was fined $500 for the misdemeanor and was sentenced to a term of 15 years in

the Nebraska Penal and Correctional Complex for the felony. Defendant's motion for a new trial alleged that the verdict was not sustained by the evidence, was contrary to law, and that there were irregularities in the proceedings preventing him from having a fair trial. In this court he assigns as error the action of the trial court in overruling his motion to suppress evidence seized as the result of a warrantless search and in overruling his motion for a new trial. In his brief, Ohler argues only the overruling of his motion to suppress. He makes no claim that the evidence, if properly admitted, did not sustain his conviction. We affirm.

The defendant was arrested on May 3, 1979, in a common areaway or alley located behind several business establishments in York, Nebraska. Ohler had entered several of the businesses through the rear door service entry and made contact with several proprietors and employees. One proprietor testified that Ohler had inquired whether the U.P.S. man had been there; another proprietor testified that Ohler told her that he had just come by to say "hello" and, after some conversation, he said he was looking for a lady with a little child. After the conversation about the U.P.S. man, the proprietor of the drugstore became suspicious and called the police department.

Police Sergeant Ronald Dickerson received the call which described the defendant, and he went to the area where he saw a man matching that description walking toward him in the alley, carrying a cardboard box under his arm. Sergeant Dickerson identified himself and then asked the man for identification. The man put his box down onto the ground and presented the officer with a card identifying himself as Jerry G. Ohler. Shortly thereafter, the chief of police, Franklin D. Valentine, arrived on the scene and, after some conversation, told Ohler that some incidents had occurred 1 to 3 months earlier in which a man had been going around asking the same questions which Ohler had asked on this date and that Ohler matched the description of that

individual. Valentine then told Ohler that, due to the circumstances, he would like Ohler to accompany them down to the police department to check it out further, and Ohler agreed to accompany the officers.

Sergeant Dickerson then asked Ohler what was in the box that he had placed on the ground. Dickerson testified at the preliminary hearing as follows: "Q. And what if anything did he tell you. A. He didn't tell me anything and I opened the --- Q. He didn't make any response at all when you asked him what was in the box. A. Well, he didn't tell me what was in the box he just said it was something, that he had found the box up the alley. Q. And what was -- what happened next. A. Well, I asked him if he had any objections if we looked in the box to see what he had. He was coming out from a store. Q. What was his response? A. Well, as far as I remember *he said that he didn't make any objections.*" (Emphasis supplied.)

The sergeant then opened the box and inside saw two pairs of men's boots which appeared to be new. Ohler was asked if he had a sales slip for the merchandise. The reply was in the negative, and Ohler further explained that he had found the boots near a trash receptacle down the alley. He then took the officers down to where he purportedly found the boots. At that time the officers placed the defendant under arrest for possession of stolen property or theft by unlawful taking. Ohler was patted down for weapons and when he opened his jacket the officer found a spatula with a wooden handle tucked into the waist of his pants. It was bent and had some zigzag marks on it.

Following the arrest, defendant was taken to police headquarters and his automobile was impounded. A search warrant was secured for a search of the car, based on an affidavit of Police Officer Michael Rathje. The affidavit set forth information regarding incidents which occurred in January of 1979 involving a burglary of the Sugar Plum Tree store of a sack of cash and checks. Another incident involved a burglary in an

apartment in the city of York of a large amount of jewelry. The affidavit stated that a man suspected of committing both acts matched the description of a man who had been entering a number of businesses in downtown York in January asking questions and using the same excuses for entering the rear of the store as did the man whom the police had in custody for possession of the stolen boots. The warrant was to search Ohler's car for a black knee-length coat worn by the man in January, one briefcase, and the jewelry stolen from the apartment.

The search uncovered such items as bent and scratched knives, skeleton keys, penlight flashlights, a screwdriver, a sledge hammer, and a steel punch. At trial, experts testified that these items could be and frequently were used as burglary tools.

After the preliminary hearing and prior to trial, Ohler's attorney filed a motion in limine and a motion to suppress all evidence held by the State, alleging that the evidence was obtained by an illegal search and seizure of defendant's person and vehicle. The motion recited that the search was made before defendant was placed under arrest; that the search was made without the consent of defendant; that no probable cause existed for the search, seizure, and arrest; and that defendant has standing to complain that the search was illegal. By stipulation of the parties the search warrant and affidavit and the transcript of the preliminary hearing were admitted as evidence on the motions. No further evidence was adduced at the hearing. We further note that the defendant not only did not testify at the preliminary hearing nor at trial, but neither was any other evidence presented by the defense to contradict the State's witnesses.

The trial court overruled the motion to suppress and the defendant has assigned that action as error. We note initially that there were two separate searches and seizures to which the motion to suppress applies. The first search was of the defendant's box and person in

which the police seized two pairs of boots and the spatula with the wooden handle. The second search and seizure was of the defendant's automobile in which police seized the burglary tools. If, as the defendant contends, the initial search and seizure and arrest were illegal, it is possible that the second search and seizure, although pursuant to a warrant, could be tainted as fruit of the poisonous tree.

We must determine whether the disputed search and seizure infringed an interest of the defendant which the fourth amendment was designed to protect. *Rakas v. Illinois*, 439 U.S. 128, 99 S. Ct. 421, 58 L. Ed. 2d 387 (1978). "The interest protected was defined by *Katz v. United States*, 389 U.S. 347, 88 S. Ct. 507, 19 L. Ed. 2d 576 (1967), where the Supreme Court held that the capacity to claim the protection of the fourth amendment depends not upon a property right in the invaded place, but upon whether the person who claims the protection of the amendment has a legitimate expectation of privacy in the invaded place." *State v. Vicars*, 207 Neb. 325, 329, 299 N.W.2d 421, 425 (1980). The question we must answer is whether governmental officials violated any legitimate expectation of privacy held by the defendant. *Rawlings v. Kentucky*, 448 U.S. 98, 100 S. Ct. 2556, 65 L. Ed. 2d 633 (1980).

The evidence reveals that the defendant consented to the search of the cardboard box. The defendant cannot assert any expectation of privacy in an area in which he gave governmental officials the permission to inspect. "Whether or not consent to search was freely and intelligently given is a question of fact to be determined from the totality of all the circumstances surrounding it." *State v. French*, 203 Neb. 435, 439, 279 N.W.2d 116, 119 (1979). The State presented evidence that the defendant consented to the search of the box. The defendant did not contradict that testimony, either directly or indirectly, nor was it challenged as being involuntary or coerced. We believe that the State has met its burden.

Since we have determined that the search of the box and seizure of the boots were lawful, the subsequent arrest of the defendant was based upon probable cause and therefore legal. There was no "poisonous tree" to taint the search, pursuant to warrant, of the defendant's car and the seizure of the burglary tools. The trial court was correct in overruling the motion to suppress the evidence.

The lawful owner of the boots identified them as having come from her store, and she further testified that she had not given permission to the defendant to have them in his possession. The tools taken from defendant's car were described by expert testimony to be burglary tools. This evidence was clearly sufficient to support the jury's verdict of guilty as to both crimes. This court will not interfere with a conviction based upon evidence unless it is so lacking in probative force that as a matter of law it can be said that it is insufficient to support a verdict of guilt beyond a reasonable doubt. *State v. Booth*, 202 Neb. 692, 276 N.W.2d 673 (1979).

The judgment and sentence of the District Court were correct and are affirmed.

AFFIRMED.

BRODKEY, J., concurring in result.

While I concur in the result reached by the majority of the court, I must strongly disagree with the grounds upon which the majority opinion is based, to wit, that the search by the police of the unsealed and partially opened cardboard box carried by the defendant and placed by him upon the ground prior to the search was a valid "consent search" pursuant to the voluntary and uncoerced consent and permission of the defendant. Of the various available grounds for affirming the conviction of the defendant in this case, the one selected by the majority of the court is, in my opinion, by far the weakest, and not sustained by the record. There are, however, several other valid grounds not mentioned or referred to in the majority opinion upon which de-

fendant's conviction can and should be sustained, as hereinafter discussed.

The sole and only basis for the conclusion of the majority that the defendant gave his consent to a search of the box is the following testimony of Officer Dickerson given at the preliminary hearing in this matter, as follows: "Q. And what was -- what happened next. A. Well, I asked him if he had any objections if we looked in the box to see what he had. He was coming out from a store. Q. What was his response? A. Well, *as far as I remember* he said that he didn't make any objections." (Emphasis supplied.) It should be noted, however, that when Officer Dickerson testified at the trial regarding the incident, he made no mention of the foregoing alleged consent to search, but only testified that he had asked the defendant what was in the box, but that the defendant did not tell him, and also that the box was partially opened and "we looked inside." He was then asked: "Do you remember testifying back at the Preliminary Hearing, don't you, in this matter? A. Yes, sir. Q. And I believe that on approximately page fifty-three of the Preliminary Hearing testimony, I believe the question was asked, 'What, if anything, did he tell you?' This is after you had stopped him. Then you stated in response, 'He didn't tell me anything and I opened the --' Then you just stopped and the question came back. 'He didn't make any response at all when you asked him what was in the box? Answer: Well, he didn't tell me what was in the box, he just said it was something.'" Officer Dickerson also testified that he was in uniform at that time. Chief of Police Valentine of York, Nebraska, who was also present at the time of the questioning, testified at the trial with reference to the defendant Ohler as follows: "I asked him if that was his box and he stated it was, and at that time, there was another sergeant present, which was *Sergeant Leach* and he opened the box up and it had two pair of boots in it." (Emphasis supplied.)

Even assuming, however, that it was Officer

Dickerson who had the conversation with the defendant immediately prior to the time that he searched the cardboard box, it is clear from the foregoing testimony that the officer, who was in uniform, did not directly and positively testify that the defendant had given him his consent to search the box, but merely testified that "as far as he could remember" the defendant did not make any objections.

"Consent to search is not to be lightly inferred, but should be shown by clear and convincing evidence, and any consent must be voluntary and uncoerced, either physically or psychologically. The government has the burden of proving the alleged consent. And it has been said that courts do not look with favor on the practice of substituting consent for the authorization of a search warrant." 68 Am. Jur. 2d *Searches and Seizures* § 46 at 699 (1973). It is the general rule that "when statements of accused clearly indicate that the search or seizure is made with his voluntary consent he will be held to have waived his rights under the guaranty. Where, however, the surrounding circumstances show that they were not voluntarily made, the courts have generally regarded statements which ostensibly indicated invitation or consent to search as being involuntarily made, and hence not constituting consent or waiver." 79 C.J.S. *Searches and Seizures* § 62 at 821-22 (1952). See, also, note 89 at 822 of the above citation, where particular statements are set out which have been held by the courts not to constitute waiver or consent.

The case of *State v. French*, 203 Neb. 435, 279 N.W.2d 116 (1979), cited in the majority opinion for the proposition that whether or not consent to search was freely and intelligently given is a question of fact to be determined from the totality of all the circumstances surrounding it, is actually and factually more in support of the position of the defendant with reference to his alleged consent to search than it is authority for the State. That case involved the search of the house of the

defendant by two deputy sheriffs, Earhart and Anderson. While Deputy Earhart led the defendant into the open and handcuffed him and put him in the police car, the defendant heard Deputy Anderson break open the kitchen door. While the defendant was sitting in the police car handcuffed he was asked for permission to go into the house, although no purpose for such entry was suggested. The defendant responded: "'Well, yeah. It won't make any difference anyway.'" In its opinion the court stated at 440, 279 N.W.2d at 119: "Even if Deputy Earhart might have believed, at that point, that the defendant had given voluntary, knowing, and intelligent consent to enter the house, Earhart discovered very shortly thereafter that Deputy Anderson had already broken into the house without any authorization whatever. Deputy Earhart was sufficiently uncertain about the consent situation, in view of the circumstances, that he returned to the defendant and said: 'You would have given us consent anyway, wouldn't you?' The defendant answered: 'No.' Earhart confirmed that answer on cross-examination." In that opinion we stated at 441, 279 N.W.2d at 120: "It was neither reasonable nor justifiable for them to conclude that they had the voluntary and intelligent consent of the defendant to make a search. The search was unreasonable. The motion to suppress should have been granted." In this case, notwithstanding the fact that the trial court apparently found that the defendant, by the single ambiguous statement set out above, had consented to the search of the box in question, I believe that the evidence introduced was clearly not sufficient to establish by clear and convincing evidence that the defendant intended to waive his constitutional immunity to an illegal search and seizure.

However, even assuming arguendo that this court could conclude from the foregoing evidence, without straining its credulity, that the foregoing ambiguous statement allegedly made by the defendant was sufficient to constitute a consent to search the cardboard

box, I am of the opinion that the majority of this court might better and should have based its opinion on other and stronger existing grounds, primarily that the defendant's fourth amendment rights were not violated for the reason that he did not have a legitimate expectation of privacy in the unsealed, partially opened cardboard box. The law is now well settled, and is so recognized in the majority opinion, that the capacity to claim the protection of the fourth amendment depends not upon a property right in the invaded place, but upon whether the person who claims the protection of the amendment has a legitimate expectation of privacy in the invaded place. See, *Katz v. United States*, 389 U.S. 347, 88 S. Ct. 507, 19 L. Ed. 2d 576 (1967); *Rakas v. Illinois*, 439 U.S. 128, 99 S. Ct. 421, 58 L. Ed. 2d 387 (1978); Case Note, 13 Creighton L. Rev. 653 (1979); Case Note, 58 Neb. L. Rev. 1123 (1979). On June 25, 1980, the Supreme Court of the United States in *United States v. Salvucci*, 448 U.S. 83, 100 S. Ct. 2547, 65 L. Ed. 2d 619, expressly overruled the case of *Jones v. United States*, 362 U.S. 257, 80 S. Ct. 725, 4 L. Ed. 2d 697 (1960), which case had held that defendants charged with crimes of possession were entitled to claim "automatic standing" to challenge the legality of the search which produced the evidence against them, without regard to whether the defendants had an expectation of privacy in the area or premises searched or the property seized. In *Salvucci*, the Supreme Court held, *inter alia*, that defendants charged with crimes of possession may only claim the benefits of the exclusionary rule if their own fourth amendment rights have been violated. In *Rawlings v. Kentucky*, 448 U.S. 98, 100 S. Ct. 2556, 65 L. Ed. 2d 633 (1980), a case announced the same day as *Salvucci*, the court held that a defendant charged with the crime of possession has the burden of proof in establishing that he has a legitimate expectation of privacy in the area searched or the article seized. It is clear from the existing authorities that the defendant did not sustain his burden of proof that he had a legitimate expectation of privacy in the cardboard box

which was searched and the articles contained therein which were seized by the York city police. The courts have differentiated between various types of containers which are entitled to an "expectation of privacy," regardless of their location or the right to possess them. In *United States v. Chadwick*, 433 U.S. 1, 97 S. Ct. 2476, 53 L. Ed. 2d 538 (1977), the court noted that "luggage is intended as a repository of personal effects," and that the defendants, by placing their property in a locked footlocker, "manifested an expectation that the contents would remain free from public examination." Later, in *Arkansas v. Sanders*, 442 U.S. 753, 99 S. Ct. 2586, 61 L. Ed. 2d 235 (1979), the court stated that certain containers such as luggage, suitcases, or footlockers were "inevitably associated with the expectation of privacy," and because of their recognition in society as a repository for personal effects, their presence in a car or having fallen into public hands does not alter the reasonableness of an expectation that they will not be opened by the police. The court also held in that case that not all containers, packages, or parcels deserve the full protection of the fourth amendment, and differentiated their fourth amendment treatment from that associated with personal luggage. An excellent and exhaustive review of the cases differentiating the types of containers which will be afforded the protection of the fourth amendment against unreasonable searches and seizures and indicating the types to which the "expectation of privacy" standard will apply is found in the recent case of *People v. Maldonado*, 76 App. Div. 2d 691, 431 N.Y.S.2d 580 (1980). With reference to the type of container involved in the instant case, the court in *Maldonado* had the following to say at 696, 431 N.Y.S.2d at 583:

"More troublesome are cases which involve searches of containers which are neither luggage nor have any of the attributes thereof. The courts, with the notable exception of the California Supreme Court in *People v Dalton* (24 Cal 3d 850, cert den *sub nom. California*

v Dalton, 445 US 946 [wherein the warrantless search of a large metal box and a 'Longine' box was deemed to be unlawful]), have generally upheld searches of unsecured boxes (*United States v Neumann*, 585 F2d 355; *State v Kahlon*, 172 NJ Super 331), paper bags (*United States v Ross*, __F2d__ [DC Cir, TAMM, J., April 17, 1980]; *United States v Vento*, 533 F2d 838; *Clark v State*, 574 P2d 1261 [Alaska]; *Webb v State*, *supra* [dictum]), and other receptacles such as: plastic bags (*United States v Gooch*, 603 F2d 122; *Flynn v State*, 374 So 2d 1041 [Fla]), a closed but unlocked toolbox (*Wyss v State*, 262 Ark 502), a covered paper cup *People v Diaz*, 101 Cal App 3d 440) and an ice chest (*State v Heberly*, 120 Ariz 541).

"On the other hand, several courts have invalidated searches of nonluggage type containers which are locked (*People v Dalton*, *supra* [metal box]), zippered (*People v Belton*, 50 NY2d 447 [zippered pockets of a jacket found in a car during a warrantless search of the vehicle]; *United States v Markland*, 489 F Supp 932 [an insulated bag]), taped (*United States v Dien*, 609 F2d 1038 [cardboard box]; *People v Spencer*, 74 AD2d 77 [cardboard box]), or fastened shut (*People v Rinaldo*, 80 Ill App 3d 433 [large box with metal straps]).

Among the cases cited in *Maldonado*, *supra*, is *United States v. Neumann*, 588 F.2d 355 (8th Cir. 1978), in which the court considered a warrantless search of a department store box and stated at 360-61: "This court is of the opinion that the warrant requirement in *Chadwick* should not be extended to the facts of this case. There is simply an insufficient expectation of privacy in an unsecured cardboard box sitting in plain view in the passenger compartment of an automobile. The arresting officers merely lifted the lid of the box and discovered a large quantity of pills." The court in *Maldonado* also stated at 700, 431 N.W.S.2d at 585: "While a box of this sort is commonly used to transport

recently purchased clothing, it is hardly comparable to personal luggage which securely encases varied articles of a personal nature. Like the department store box in *Neumann*, the 'Ripley Howard' box was discovered in plain view on the floor of the automobile, and could be opened by merely lifting a lid."

We note in passing, however, that if the defendant in this case would have sealed the cardboard box, or would have securely tied or fastened it in some manner, thereby manifesting a special expectation of privacy, the search by the police would have required the issuance of a search warrant under the law above quoted.

I also think that the majority opinion in this case might well have found that the search in question was one incident to an arrest, notwithstanding the fact that the defendant was arrested after the search was accomplished. The fact is, however, that the arrest was almost contemporaneous with, and immediately followed, the search of the box and the "pat down" of the defendant in which a spatula was discovered on his person. In *Rawlings v. Kentucky*, 448 U.S. 98, 100 S. Ct. 2556, 65 L. Ed. 2d 633 (1980), the U.S. Supreme Court stated at 111: "Where the formal arrest followed quickly on the heels of the challenged search of petitioner's person, we do not believe it particularly important that the search preceded the arrest rather than vise versa."

Finally, I point out that the actual search of the defendant's car, during which the burglary tools were discovered, was done pursuant to a validly issued search warrant. While it conceivably may be argued that this violated the "fruits of the poisonous tree" doctrine, this is entirely conjectural, and I am far from convinced that it did. If it be concluded that a search, and the resulting evidence recovered in such search, was valid and did not constitute the "fruits of the poisonous tree," then such evidence would clearly be sufficient in itself to sustain the conviction of the defendant.

For all of the above stated reasons, I can only concur in the result reached by the majority of this court in its opinion, and strongly believe that the opinion should have been based upon other grounds than it was.

IN RE INTEREST OF WITHERSPOON. STATE OF NEBRASKA, APPELLEE, V. JAMES C. SMITH, APPELLANT.

305 N.W.2d 644

Filed May 8, 1981. No. 43433.

1. **Constitutional Law: Statutes.** Neb. Rev. Stat. § 43-209(6) (Reissue 1978) is sufficiently definite and is not unconstitutionally vague.
2. **Statutes.** One to whose conduct a statute clearly applies may not successfully challenge it for vagueness.
3. **Parental Rights.** The right of a parent to maintain the custody of his or her child is a natural right subject only to the paramount interest which the public has in the protection of the rights of a child.
4. ____ In a proceeding to terminate parental rights under Neb. Rev. Stat. § 43-209(6) (Reissue 1978), there must be a determination that the child is one described in subsection (1) or (2) of Neb. Rev. Stat. § 43-202 (Reissue 1978), and that reasonable efforts, under the direction of the court, have failed to correct the conditions leading to that determination.
5. ____ Parental rights may be forfeited by substantial, continuous, and repeated neglect of a child and a failure to discharge the duties of parental care and protection.

Appeal from the Separate Juvenile Court of Douglas County. Affirmed.

Patrick H. McDonnell for appellant.

Donald L. Knowles, Douglas County Attorney, and Marjorie A. Records for appellee.

Heard before KRIVOSHA, C.J., BOSLAUGH, MCCOWN, BRODKEY, WHITE, and HASTINGS, JJ.

MCCOWN, J.

This is a proceeding to terminate the parental rights of an unmarried father. The District Court terminated the father's parental rights and the father has appealed.

James Witherspoon was born December 18, 1976. His mother and his father, the appellant here, were unmarried. The parents lived together for some undisclosed period of time after the birth of the child, but the relationship was a stormy one, and by sometime early in 1978 they were living apart and the son remained with his mother. The father provided some support for the son during the time they were living together but did not furnish any support after the mother and father separated.

The mother had an older child by a different father and had severe psychological, drug, and alcohol problems. On June 2, 1978, the mother called the police and asked them to pick up the children because she thought she was about to have a nervous breakdown. Thereafter the county attorney filed a petition under Neb. Rev. Stat. § 43-202(1) (Reissue 1978) to have the children declared homeless and without proper support. The children were placed in the temporary custody of Douglas County Social Services for temporary foster care. The only child involved in the present appeal is James.

On August 30, 1978, an adjudication hearing was held. The juvenile court found that James was the son of the appellant and found that James was homeless or destitute and without proper support through no fault of his parents within the meaning of § 43-202(1). The court retained custody in the Douglas County Social Services and granted the parents reasonable rights of visitation.

On October 3, 1978, a review hearing was had. At that time the appellant was living with a sister in Omaha and was employed and earning an income of $950 per month. The appellant proposed that he be given custody of James and stated that he could keep the child at his sister's home. The juvenile court ordered James' custody

to remain as previously ordered and also ordered that the appellant become involved in counseling at the Family Services on a regular basis and pay child support in the sum of $40 per month. The court also made extensive orders with respect to the mother.

On March 26, 1979, the juvenile court held another review hearing. The appellant had not paid any child support as ordered, nor had he attempted to comply with the order for counseling at Family Services. The appellant testified that his employer had reduced his hours and that he had no money left to pay child support. The juvenile court ordered appellant to participate in a positive parenting group on a weekly basis, to find and maintain adequate independent housing, and to maintain an adequate source of income for himself and his son. The court also ordered that he maintain regular visitation and pay child support of $40 per month.

On November 15, 1979, the State filed a motion to terminate the parental rights of both the mother and the father under Neb. Rev. Stat. § 43-209(6) (Reissue 1978). The mother executed a voluntary relinquishment and her parental rights were terminated on February 21, 1980.

Hearings were held on January 10 and February 5, 1980. The evidence for the State established that the appellant had failed to make any child support payments, had failed to attend parenting classes, did not obtain adequate housing independent from his sister, and had failed and refused to cooperate with the court services officer. There was also evidence that the appellant had quit his job because he did not receive a promotion he desired. The appellant's evidence was that he had various bills for which his wages were being garnished, that he had been unable to obtain other employment, and that he had failed to attend parenting classes because he already knew how to take care of children.

Following the hearings the matter was taken under advisement by the juvenile court, and on March 3, 1980,

the appellant applied to the court for custody of James upon the ground that he had been offered a job in Louisiana where he had relatives who would assist in raising James. He admitted on cross-examination that he had failed to comply with the previous orders of the court. On March 6, 1980, the juvenile court denied the application for custody and terminated the parental rights of the appellant. This appeal followed.

The appellant contends that § 43-209(6) is unconstitutionally vague. This court has previously held that the statute meets constitutional standards. See, *State v. Metteer*, 203 Neb. 515, 279 N.W.2d 374 (1979); *State v. Souza-Spittler*, 204 Neb. 503, 283 N.W.2d 48 (1979).

The right of custody and control creates a duty of care and support. *State v. Logan*, 204 Neb. 204, 281 N.W.2d 753 (1979). In the case at bar the appellant stipulated in the original proceeding that James was without proper support. The court entered an order requiring the appellant to pay $40 per month child support. For more than a year, even while he was regularly employed, appellant completely failed to comply with that order as well as with the other orders of the court. While the appellant was fully aware of what was required of him in regard to his basic parental responsibilities, he failed to make even a good faith effort to comply. Under such facts the appellant is in no position to challenge the statute as unconstitutionally vague. One to whose conduct a statute clearly applies may not successfully challenge it for vagueness. *State v. Shiffbauer*, 197 Neb. 805, 251 N.W.2d 359 (1977).

The appellant contends that parental rights may be terminated only upon presentation of clear and convincing evidence, and that the evidence is not clear and convincing that the appellant is unfit or that he has forfeited his parental rights. The right of a parent to maintain the custody of his or her child is a natural right subject only to the paramount interest which the public has in the protection of the rights of a child. In a proceeding to terminate parental rights under § 43-209(6),

there must be a determination that the child is one described in subsection (1) or (2) of § 43-202, and that reasonable efforts, under the direction of the court, have failed to correct the conditions leading to that determination. *In re Interest of Kimsey, ante* p. 193, 196, 302 N.W.2d 707, 709 (1981).

We have repeatedly held that in such cases the best interests of the child are paramount and that parental rights may be forfeited by substantial, continuous, and repeated neglect of a child and a failure to discharge the duties of parental care and protection. *State v. Jenkins*, 198 Neb. 311, 252 N.W.2d 280 (1977).

In the case at bar the evidence was clear and convincing and the trial court did not abuse its discretion in entering its order terminating the parental rights of the appellant.

AFFIRMED.

CLINTON, J., participating on briefs.

KRIVOSHA, C.J., dissenting.

I continue to believe that we are using "overkill" in these cases coming before us involving the termination of parental rights. While we concede that before parental rights may be terminated there must be clear and convincing evidence to support the need for such drastic action, we nevertheless continue to terminate rights on evidence which I believe to be less than clear and convincing. See, dissent of Krivosha, C.J., *In re Interest of Goodon, ante* p. 256, 303 N.W.2d 278 (1981); *In re Interest of Cook, ante* p. 549, 304 N.W.2d 390 (1981).

As noted by the majority in this case: "The evidence for the State established that the appellant had failed to make any child support payments, had failed to attend parenting classes, did not obtain adequate housing independent from his sister, and had failed and refused to cooperate with the court services officer." While, to be sure, the failure of appellant to pay child support is not worthy of praise and requires the court to take appropriate action, the failings of the appellant herein

appear to be not dissimilar to those of others found within our society whose parental rights are not terminated.

Moreover, appellant's failure to attend parenting classes and his failure and refusal to cooperate with a court service officer may be contrary to the court's order. The record, however, fails to disclose how that failure has in fact affected the child. Finally, I am unable to ascertain what error was committed by the appellant sufficient to terminate parental rights by reason of his failing to obtain adequate housing independent from his sister. I know of no rule of law or reason which suggests that a child is adversely affected by living with other members of the family so long as such housing is adequate for all.

The record does support the view that the appellant could perform better as a parent and that the child probably will be better cared for by another family with greater education and income. That, however, is not the criteria which we should use in terminating parental rights. I would have continued to supervise the care of the child but would not have terminated parental rights.

ROBERT I. KULLY, APPELLEE, V.
WILLIAM A. GOLDMAN, APPELLANT.

305 N.W.2d 800

Filed May 15, 1981. No. 43242.

1. **Trusts.** Mere expectancies cannot be held in trust.
2. ____ No trust can be created unless there exists some property interest which may be held by the trustee for the claimant.
3. **Trusts: Specific Performance.** In order for equity to recognize a promise to create a trust in the future when a property or property interest comes into existence, the promise must be supported by a consideration. If no consideration exists, the promise is not specifically enforceable.

Appeal from the District Court for Douglas County: D. NICK CAPORALE, Judge. Affirmed in part, and in part reversed with directions to dismiss.

John F. Thomas of McGrath, North, O'Malley & Kratz, P.C., for appellant.

Bennett G. Hornstein of Taylor, Hornstein & Peters for appellee.

Heard before BOSLAUGH, CLINTON, and BRODKEY, JJ., and REIMER and HIPPE, District Judges.

CLINTON, J.

This action was brought in the District Court for Douglas County by the plaintiff, Robert I. Kully, against the defendant, William A. Goldman, asking the court to temporarily and permanently enjoin Goldman from withholding "the transfer to plaintiff" annually of season tickets to four specific seats to the University of Nebraska varsity football games and from doing anything to prejudice Goldman's "future ability to receive such tickets from the University." The prayer further asked that Goldman be declared trustee of said tickets for Kully's use.

The action is based upon an oral agreement alleged to have been made in 1961 in which Goldman agreed to acquire for Kully four season tickets as well as four for himself. The action is founded upon the alternative theories of (1) a trust, either express, resulting, or constructive; (2) an agreement of agency to annually purchase and transfer the tickets; and (3) a breach of contract to annually purchase and transfer the tickets.

The petition prayed for special relief as to the tickets for the remainder of the 1979 season (the action being tried in the early fall of 1979), and asked for immediate relief so that Kully might use those tickets pending final determination.

The trial court found that as to the tickets for the

remainder of the 1979 season, the parties had entered into an accord and satisfaction and denied the requested relief. As to tickets for future seasons, it found that an implied trust existed and that upon execution by Kully of an undertaking with sufficient sureties in the sum of $500, Goldman be mandatorily enjoined, on being tendered by Kully the actual retail price then charged Goldman by the University of Nebraska to obtain from the university the described tickets "for all future seasons of the University of Nebraska varsity football team home games for the use and benefit of Plaintiff."

We affirm the judgment insofar as it pertains to the 1979 tickets. As to the balance of the judgment, we reverse and direct dismissal of the action. In so doing, even though this matter is tried de novo in this court, we accept the factual findings of the trial court that in about 1961 the parties made an agreement that Goldman would obtain from the University of Nebraska Athletic Department four season tickets for his own use and four for the use of Kully; that ticket reservations were made in Goldman's name; and that from the time the agreement was made in about 1961 until 1979, with the exception of the year 1972, Goldman purchased the four tickets and was paid annually by Kully either before or after the tickets were obtained.

The reason for the partial reversal is that the record establishes that there exists no legally recognized res which may be the subject of a present resulting trust and, secondly, no continuing annually resulting trust could arise where the promise is not supported by consideration. Furthermore, specific performance of an agreement ought not to be granted if it can be made nugatory by the action of a third party.

It is fundamental that in order for a present trust, whether express, resulting, or constructive, to be created, there must be a defined interest or ascertainable object of ownership. Bogert, Trusts and

Trustees §§ 111, 113 (2d ed. 1965), and § 451 (Rev. 2d ed. 1977). An agreement to create a trust in the future in order to be specifically enforceable must be supported by a consideration. *Op. cit.* § 113 at 578-79; Restatement (Second) of Trusts § 26, Comment m (1959). In order for a resulting trust of the purchase money type to arise, the trust claimant must prove payment of the purchase money at the time of or before title is acquired by the trustee. Bogert, Trusts and Trustees § 456 (Rev. 2d ed. 1977).

In this case the evidence shows that Goldman had no contractual right with the university which bound it to annually, for any period of time, sell him tickets upon tender by him of the purchase price. Because Goldman was on the list of annual purchasers, his prospect of obtaining the same seats and the same number of seats each year was good. It was not, however, a property right which he could enforce. The university could, at any time if it chose, refuse to sell tickets to Goldman. Although it is undoubtedly true that the university, barring some change in circumstances, was most likely to continue to sell Goldman tickets, it was not required to do so. In 1971 Kully sought to have the four season tickets transferred to his own name. The university's agent declined to do so, saying: "At the time I talked to you, I did not realize that the seats in question were in the east stadium.

"Several years ago we were faced with the problem of the ever increasing student body, and upon direction of the Board of Regents agreed not [to] reassign any seats in the east stadium, but rather to hold them for the students. In this way it has been possible to continue throughout the last few years *without taking seats away from old season ticket holders.*

"For this reason I cannot comply with your request to transfer the seats in section 104 to you." (Emphasis supplied.) This clearly indicates that the university considered itself as having the option not to honor

future reservations. No attempt was made by Kully to prove otherwise and his own testimony acknowledges the fact that Goldman had no contractual rights to tickets in future seasons.

In a memorandum accompanying its order the court impliedly found that there was no consideration for Goldman's promise to Kully to acquire tickets. The court, in its memorandum, stated: "Consideration is not a legal requirement of implied trusts." Kully introduced no evidence that there was an agreement to pay a consideration for Goldman's services.

It appears to be the universal rule that mere expectancies cannot be held in trust. Restatement (Second) of Trusts § 86 (1959); Bogert, Trusts and Trustees § 113 (2d ed. 1965). The courts have uniformly held that no trust can be created unless there exists some property interest which may be held by the trustee for the claimant. *American Sodium Co. v. Shelley*, 51 Nev. 344, 276 P. 11 (1929) (a revocable permit); *Voelkel et al. v. Tohulka et al.*, 236 Ind. 588, 141 N.E.2d 344 (1957) (a mere expectancy); *Hise v. Grasty*, 159 Va. 535, 166 S.E. 567 (1932) (an idea); *Edgar v. Fitzpatrick*, 377 S.W.2d 314 (Mo. 1964) (an interest not yet in existence). In *New England Trust Co. v. Sanger*, 337 Mass. 342, 348, 149 N.E.2d 598, 602 (1958), the court said: "It is equally plain that there can be no trust unless there is an existing trust res (Restatement: Trusts, § 74), and that an interest which has not come into existence cannot be held in trust. *Bennett v. Littlefield*, 177 Mass. 294, 300. Restatement: Trusts, § 75."

In order for equity to recognize a promise to create a trust in the future when a property or property interest comes into existence, the promise must be supported by a consideration. Restatement (Second) of Trusts § 75, Comment b, § 86, Comments b and c (1959). If no consideration exists the promise is not specifically enforceable. Restatement of Contracts § 366 (1932). The authors of the Nebraska annota-

tions to the Restatement cite in support of the foregoing proposition cases of options to purchase which are not supported by a consideration. See Annot. to § 366 (Supp. II 1933).

The above principles are implicit in our holding in *Valentine Oil Co. v. Powers*, 157 Neb. 71, 59 N.W.2d 150 (1953). That was an action to compel specific performance of an escrow agreement for the delivery of certain oil and gas leases upon compliance with certain conditions. The documents themselves, although still held in escrow, had terminated because there had been a failure to pay delay rentals or to commence the drilling of a well within the required time period. We there said at 86-87, 59 N.W.2d at 160: "'Based on the general equitable doctrine that equity will not render a decree which it is impractical to carry out, and because equity will not do a vain thing, a decree for the specific performance of a contract will not be granted if it would be, or could be made, nugatory . . . .'"

In the case before us, the court's decree directing specific performance was improper because there was no existing res which could be the subject of a present trust and because, insofar as a promise related to acquisition of tickets for "all" future seasons, it was unsupported by a consideration. Without question, of course, where one person furnishes money to another to purchase tickets for him and the latter does so, the purchaser does hold the tickets in resulting trust for the one furnishing the funds and such trust could, in otherwise appropriate circumstances, be specifically enforced. Kully's two other theories of recovery are not supportable because of the absence of consideration and lack of proof of monetary damage. In addition, a contract to act as agent is not usually specifically enforceable in equity. *Bethlehem Engineering Export Co. v. Christie*, 105 F.2d 933 (2d Cir. 1939); *Ice Cream Co. v. Dept. of L.C.*, 154 Ohio St. 357, 96

N.E.2d 203 (1950); *The Case of Mary Clark*, 1 Blackf. 122, 12 Am. Decs. 213 (1821).

AFFIRMED IN PART, AND IN PART REVERSED WITH DIRECTIONS TO DISMISS.

REIMER, District Judge, dissenting.

I respectfully dissent from the majority opinion, and would have affirmed, in part, the decision of the District Court and remanded the matter to the District Court with directions to partition in kind the subject matter of the litigation and set over to the plaintiff whatever right to renew the tickets for the four seats plaintiff has used for the past 17 years as might exist in the defendant.

In this case, the majority makes much of the absence of a monetary consideration, but in the past has not expressed so great a concern. In *Litz v. Wilson*, *ante* p. 483, 304 N.W.2d 48 (1981), a nominal recitation of a $1 downpayment was sufficient monetary consideration for a $100,000 contract; and in *Kinkenon v. Hue*, 207 Neb. 698, 301 N.W.2d 77 (1981), a "live-in" arrangement which had already been performed by the promisee was sufficient consideration for transfer of a home for life use. The real consideration in each of the referenced cases is the mutuality of the promises exchanged, and the same is true in the instant case with some 17 years of recognition.

KASSANDRA AIMEE KELLIE, A MINOR CHILD, EX REL. HER PARENTS AND NEXT FRIENDS, KATHLEEN ANN KELLIE AND ALAN SHIELDS, APPELLANT, V. LUTHERAN FAMILY AND SOCIAL SERVICE OF NEBRASKA, INC., APPELLEE.

305 N.W.2d 874

Filed May 15, 1981. No. 43248.

1. **Adoption.** Strict compliance with adoption statutes is required.
2. _____. A duly executed revocation of a relinquishment and consent to adoption delivered to a licensed child placement agency within a reasonable time after execution of the relinquishment and before the agency has, in writing, accepted full responsibility for the child, as required by statute, is effective to invalidate the original relinquishment and consent.

Appeal from the District Court for Lancaster County: SAMUEL VAN PELT, Judge. Reversed and remanded with directions to issue writ of habeas corpus in accordance with this opinion.

Nelson & Morris for appellant.

James B. Cavanagh of Erickson, Sederstrom, Leigh, Johnson, Koukol & Fortune, P.C., for appellee.

Heard before KRIVOSHA, C.J., BOSLAUGH, MCCOWN, CLINTON, BRODKEY, and HASTINGS, JJ.

MCCOWN, J.

In this habeas corpus case the unmarried parents of a minor child sought to regain custody of the minor child from a licensed child placement agency. The District Court denied the writ and the parents have appealed.

Kassandra Kellie is the daughter of the relators, Kathleen Ann Kellie and Alan Shields. She was born on September 24, 1973. Her parents were then and are now unmarried. The mother, Kathleen, counseled with a social worker of the respondent, Lutheran Family and Social Service of Nebraska, Inc., at the

time Kassandra was born and ultimately decided to raise the child as a single parent.

On May 10, 1974, the District Court for Lancaster County entered a decree ordering Alan Shields to pay $90 per month child support for Kassandra and giving him reasonable rights of visitation. Kathleen maintained custody of the child from her birth until late in 1978 when the events material to this controversy arose.

During the early years of Kassandra's life Alan paid the child support required but visited his daughter only a few times. Beginning in June 1978 he voluntarily increased his child support payments to $200 per month and began visiting Kassandra much more frequently in an effort to establish a closer relationship with his daughter since he was then working in Lincoln.

Kathleen has occasionally had psychiatric treatment for depression. In the fall of 1978 she began to feel that she was not providing a suitable home for Kassandra and that her daughter would be better off if she lived in a home with both a mother and a father.

On November 2, 1978, Kathleen telephoned Steven Bryant, a social worker at the Lincoln office of Lutheran Family Service, who had previously given her advice, and told him she wanted to discuss the possibility of placing Kassandra for adoption. On November 6, 1978, she met with Bryant at his office, told him that she felt incapable of caring for the child and that someone else might do a better job, and on November 8 she reviewed the files of prospective adoptive families. She selected a tentative adoptive family, Larry and Patricia Randolph, who lived in Bridgeport, Nebraska, and asked to meet them.

On November 11, 1978, a meeting took place at Bryant's office between Kathleen and the Randolphs. Bryant and the Randolphs' son were also present. Adoption and adoption procedures were discussed. On November 17, 1978, the Randolphs returned to

Lincoln with their young son and Kathleen and Kassandra went to dinner with them. The next morning, November 18, 1978, the Randolphs returned and took Kassandra out for a drive because Kathleen felt she needed to know Kassandra's reaction to the Randolphs when her mother was not present. The Randolphs returned about noon with Kassandra.

Kathleen and Kassandra went to Bryant's office on the afternoon of Saturday, November 18, 1978. At that time Kathleen began to express some uncertainty about her own feelings. Bryant told her that she was going to have to make a decision as to the Randolphs as an adoptive family on that day and Kathleen then decided to place the child for adoption.

Bryant explained the nature of the relinquishment and told Kathleen that the relinquishment was irrevocable. Kathleen then signed the relinquishment and consent to adoption. The acceptance of the relinquishment was not signed. The child was delivered to Lutheran Family and Social Service of Nebraska, Inc., and later placed with the Randolphs.

The father, Alan Shields, never talked to Bryant or anyone else from Lutheran Family Service. Bryant knew that Shields was Kassandra's father and told Kathleen that he wanted a relinquishment from Shields but no relinquishment from Shields was ever obtained.

Three days after signing the relinquishment Kathleen called Bryant and told him that she had made a mistake and wanted Kassandra back. Bryant advised her that she could not get Kassandra back. Kathleen called Bryant again on Thanksgiving Day and went to Bryant's office twice thereafter trying to obtain Kassandra's return. On December 26, 1978, Kathleen telephoned the Randolphs and asked them to voluntarily return Kassandra and they refused.

On December 27, 1978, Kathleen personally delivered a written and notarized revocation of relinquishment to Lutheran Family and Social Service

of Nebraska, Inc., at their Lincoln office. At that time Kathleen asked to see the relinquishment and requested a copy. At that time neither copy of the relinquishment had been signed by Lutheran Family and Social Service of Nebraska, Inc. The parties have stipulated that the acceptance of the relinquishment was not signed by Lutheran Family and Social Service of Nebraska, Inc., until January 12, 1979.

On January 2, 1979, the natural parents filed this action to regain custody of Kassandra. Alan testified that he desired Kathleen to have sole physical custody of the child, but that if she failed to obtain custody he desired custody himself. At the conclusion of the trial the District Court found that Kathleen freely and voluntarily signed the relinquishment but had revoked it prior to acceptance by the respondent and that Kathleen and the Randolphs were all fit and proper persons to have custody of the child. The court also found that because Kathleen had set in motion the events which resulted in the legal proceedings by executing the relinquishment, she had forfeited her superior parental rights and that it was in the best interests of the child to remain with the Randolphs. The court made no finding as to the parental rights or fitness of Alan Shields. The District Court then denied the petition for a writ of habeas corpus and this appeal followed.

The critical section of the Nebraska adoption statutes involved here is Neb. Rev. Stat. § 43-106.01 (Reissue 1978). That section provides in part: "When a child shall have been relinquished by written instrument, as provided by sections 43-104 and 43-106, to the Department of Public Welfare or to a licensed child placement agency and the agency has, in writing, accepted full responsibility for the child, the person so relinquishing shall be relieved of all parental duties toward and all responsibilities for such child and have no rights over such child."

In the case at bar Lutheran Family Service has two executive directors and only an executive director is authorized to sign the acceptance of a relinquishment. No one signed the acceptance here on behalf of Lutheran Family Service until January 12, 1979, approximately 2 weeks after the relinquishment had been revoked by Kathleen and more than a week after this action had been commenced.

Lutheran takes the position that the statutory requirement of written acceptance is only a technical requirement and that they accepted in fact when they accepted the child at the time the relinquishment was signed.

Courts have traditionally required substantial if not strict compliance with all statutory requirements with respect to the formalities of execution of a parent's consent to adoption or relinquishment of parental rights. A consent or relinquishment which fails to meet statutory requirements cannot be given legal effect. See 2 Am. Jur. *Adoption* § 43 (1962). In this state we have followed the rule that strict compliance with the adoption statutes is required. In *McCauley v. Stewart*, 177 Neb. 759, 131 N.W.2d 174 (1964), this court affirmed the vacation of an adoption decree previously entered in the county court on the ground that the signatures on the relinquishments had not been acknowledged before a notary public at the time the relinquishments were signed. The matter of adoption is statutory, and the manner of procedure and terms are all specifically prescribed and must be followed. *In re Petition of Ritchie*, 155 Neb. 824, 53 N.W.2d 753 (1952).

This court has noted that a licensed child placement agency is required to accept responsibility for the child, in writing, under § 43-106.01. See *Kane v. United Catholic Social Services*, 187 Neb. 467, 191 N.W.2d 824 (1971).

The respondent contends that to require strict compliance with the statute will place an undue burden

upon a licensed child placement agency and create uncertainty during the time period between execution of a relinquishment and its acceptance. We disagree. Arrangements for prompt and strict compliance with the statute can obviously be made by proper administrative procedures.

A duly executed revocation of a relinquishment and consent to adoption delivered to a licensed child placement agency within a reasonable time after execution of the relinquishment and before the agency has, in writing, accepted full responsibility for the child, as required by statute, is effective to invalidate the original relinquishment and consent. Basic principles of offer and acceptance, as well as the statute, dictate that result. In the present case Kathleen attempted to revoke within 3 days after execution of the relinquishment, continued her efforts repeatedly, and delivered the duly executed revocation less than 6 weeks after the original relinquishment was signed. Under the circumstances here it was within a reasonable time.

In the case at bar the District Court quite properly found that Kathleen had the right to revoke the relinquishment and consent to adoption and that she revoked it before Lutheran had accepted, in writing, full responsibility for the child. That determination was also determinative of the habeas corpus proceeding here. Under the rules set out in *McCauley*, once the invalidity of the relinquishment and consent to adoption was established, the fitness of the natural or prospective adoptive parents, and which of them could best provide for the child, was not in issue.

It should also be pointed out that since the very recent case of *Cox v. Hendricks*, *ante* p. 23, 302 N.W.2d 35 (1981), an unmarried father may well have parental rights. In this case it is clear that Alan Shields has neither waived nor relinquished any parental rights but, instead, has joined with Kathleen in the petition for writ of habeas corpus.

The petition of the relators for a writ of habeas corpus should have been granted and the legal custody of Kassandra should have been returned to Kathleen Kellie.

REVERSED AND REMANDED WITH DIRECTIONS TO ISSUE WRIT OF HABEAS CORPUS IN ACCORDANCE WITH THIS OPINION.

WHITE, J., participating on briefs.

BRODKEY, J., concurs in result.

HASTINGS, J., dissenting.

The result of the majority opinion ignores the fundamental question which is present in every habeas corpus case involving child custody. That is, what is in the best interests of the child.

The opinion relies heavily upon *McCauley v. Stewart*, 177 Neb. 759, 131 N.W.2d 174 (1964), a proceeding in an adoption case which involved a consent and relinquishment which was void because it had not been acknowledged. The trial court had held that the suitability of the natural parents to have custody of the child would not be an issue if the adoption were invalid and there had been no abandonment. Although this court held the decree of adoption was invalid, the judgment was modified and *that portion of the decree which awarded custody of the minor child to the natural parents was not affirmed.*

In *Gray v. Maxwell*, 206 Neb. 385, 293 N.W.2d 90 (1980), we determined that a relinquishment to a private party was invalid, but went further and held that under the circumstances there must be an independent determination of the fitness of the natural parent and that an award of custody was to be founded upon the best interests of the child.

The majority today has determined that the relinquishment to an agency, if found invalid, will be treated differently than an invalid relinquishment to a private party. The fate of a child should not be

subject to such a fine distinction. The cause should be remanded for a determination of custody based upon the best interests of the child.

BOSLAUGH, J., joins in this dissent.

WHITE, J., concurring.

While I concur in the result reached by the majority in this case, I do so on the basis of the plain wording of Neb. Rev. Stat. § 43-106.01 (Reissue 1978) which requires written acceptance of responsibility for the child by the agency as well as written relinquishment by the parent in order to result in loss of parental rights. The relinquishment document itself does not operate to terminate parental rights, and the Legislature itself has determined that any time prior to written acceptance by the agency constitutes a reasonable time within which to revoke a relinquishment in favor of an agency. However, the majority is attempting to second-guess the Legislature by its statement that, even in the absence of a signed acceptance by the agency, the parent has only a "reasonable time" within which to validly revoke a relinquishment document. This gratuitous injection of a separate "reasonable time" requirement for revocation is an act not within the power of this court, since "[i]t is not within the province of a court to read a meaning into a statute that is not warranted by legislative language. Neither is it within the province of a court to read anything plain, direct, and unambiguous out of a statute." *City of Lincoln v. Nebraska Liquor Control Commission*, *ante* p. 630, 634, 304 N.W.2d 922, 925 (1981).

KRIVOSHA, C.J., and CLINTON, J., join in this concurrence.

ANNE GUYNAN, APPELLEE, V. BERNARD EDWARD GUYNAN, APPELLANT, AND LARRY AND VICKIE OSTRANDER, APPELLEES.

305 N.W.2d 882

Filed May 15, 1981. No. 43260.

1. **Trusts.** The existence of a constructive trust is to be determined by the particular facts, circumstances, and conditions of the individual case.
2. _____. A resulting trust is a trust created by act or const[illegible] of law; in its more restricted sense, and contradistin[illegible] a constructive trust, it is one raised by impli[illegible] and presumed to have been contemplated by the[illegible] intention as to which is to be found in the natu[illegible]nsactions but not expressed in the instrument of [illegible]
3. _____. It is [illegible]ly held that the foundation of resulting trusts lies in the ownership and payment of purchase money by one when title is taken in the name of another. The payment of consideration is the key issue.
4. **Trial: Appeal and Error.** Questions not presented or passed upon by the trial court will not be considered by this court on appeal.
5. **Adverse Possession.** Possession by permission of the owner will not ripen into title by adverse possession unless the change in the character of such possession has been brought home to the adverse party.
6. **Decedents' Estates.** When one claims an estate of a deceased person under an alleged oral contract, the evidence of such agreement must be clear, satisfactory, and unequivocal.
7. **Specific Performance.** One seeking specific performance of an oral contract to leave property to another has the burden of proving not only the contract but also that he has performed the obligations imposed upon him thereunder.
8. **Real Estate: Trusts.** No estate or interest in land, other than leases for a term of 1 year from the making thereof, nor any trust or power over or concerning lands, or in any manner relating thereto, shall hereafter be created, granted, assigned, surrendered, or declared, unless by operation of law, or by deed of conveyance in writing, subscribed by the party creating, granting, assigning, surrendering, or declaring the same. Neb. Rev. Stat. § 36-103 (Reissue 1978).
9. **Decedents' Estates: Wills: Trusts.** Neb. Rev. Stat. § 36-103 (Reissue 1978) shall not be construed to affect in any manner the power of a testator in the disposition of his real estate by a last will and testament, nor to prevent any trust from arising or being extinguished by implication or operation of law. Neb. Rev. Stat. § 36-104 (Reissue 1978).

10. **Specific Performance.** Nothing contained in Neb. Rev. Stat. §§ 36-101 to 36-106 (Reissue 1978) shall be construed to abridge the powers of a court of equity to compel the specific performance of agreements in cases of part performance. Neb. Rev. Stat. § 36-106 (Reissue 1978).
11. ——. Before specific performance of an oral contract to convey real estate will be decreed, the acts claimed to be in part performance themselves must unequivocally indicate the existence of the contract.

Appeal from the District Court for Keith County: HUGH STUART, Judge. Affirmed.

Firmin Q. Feltz for appellant.

C. Kenneth Spady and J. A. Lane of McGinley, Lane, Mueller, Shanahan & McQuillan for appellee Anne Guynan.

Heard before KRIVOSHA, C.J., MCCOWN, BRODKEY, and HASTINGS, JJ., and HICKMAN, District Judge.

BRODKEY, J.

Anne Guynan (Anne), plaintiff and appellee herein, brought this action of ejectment in the District Court of Keith County, Nebraska, against her son, Bernard Edward Guynan (Edward), the defendant and appellant herein, to recover certain real estate and a basement house constructed thereon, described as Lot 12, Clarkson's Subdivision to Paxton, Nebraska. Also named as defendants in this action are Larry and Vickie Ostrander, tenants of Edward at the time of trial. The trial court found generally in favor of the plaintiff and ordered each of the defendants to deliver possession of the real estate to Anne. We affirm.

The record discloses that prior to 1955 the real estate in question was owned by Bernard J. Guynan, the husband of Anne and the father of Edward. The property in question, together with adjoining real estate owned by Bernard J. Guynan, consisted of 77 acres of grassland north of Paxton, which has been used as pasturage and for dryfarming purposes. In September of 1955, Edward obtained the permission

from his father to construct a basement house on a portion of the property. Construction of the house was completed in 1956, at a cost of $9,188.51, paid for by Edward. The house measured 28 feet x 50 feet with a 7-foot ceiling, and was constructed of concrete block which was plastered on the outside and paneled on the interior walls. It appears that Edward resided in the house from 1957 to 1960, and since that time has leased the house and has received the rentals therefrom. The record indicates that during this same period all of the real estate taxes on the property have been paid by the father, Bernard J. Guynan, or his wife, Anne.

On April 16, 1970, Bernard J. Guynan died and Anne obtained title to the property in question under the provisions of her late husband's will, which gave her the election to take either a fee simple title or a life estate in this and other real estate. Anne allowed Edward to remain in possession of the premises and to continue renting it to others as he had done in the past. However, a disagreement subsequently arose between them which led Anne to demand the property, and eventually to file this ejectment action. Edward alleged in his answer and cross-petition that he is the equitable owner of the property, for the reason that his father had promised to convey the premises to him; and that in reliance upon such promise to convey, he had expended time, materials, and money in the construction of the basement home on the property.

In their brief on appeal, the defendants assign as error: (1) That the trial court erred in failing to impose a constructive trust upon the real estate in question in favor of Edward; (2) That the court erred in failing to impress a resulting trust upon said premises; (3) The court erred in failing to find that Edward had been in adverse possession of the premises for more than the statutory period, and in failing to quiet the title in Edward; (4) The court erred in requiring the defendants to surrender possession of the premises to Anne;

(5) The court erred in failing to find that Anne was estopped from claiming title and possession to the premises; and (6) The court erred in failing to find that Edward had no intention of annexing the basement house to the real estate in question.

We first consider appellant's contention that the trial court should have imposed a trust upon the property in question, particularly a constructive trust. The appellant cites as his authority for such contention our recent case of *Kuhlman v. Cargile*, 200 Neb. 150, 262 N.W.2d 454 (1978), in which case, under the facts there presented, we did impose a constructive trust upon property deeded to a woman, Molly Lind, by her daughter and son-in-law in contemplation of the proposed forthcoming marriage of Molly to Dave Kuhlman. Although the parties in that case never married, they did build a house in which they planned to live. Kuhlman paid for the costs of construction in the sum of approximately $24,000, and Molly approximately $6,000. It appears that Kuhlman was quite advanced in years and unfamiliar with business practices. He attempted to obtain a loan upon the house and discovered that the title had been placed in the name of Molly and that she would not permit him to make the loan. The marriage between the two never materialized. We imposed a constructive trust in that case upon the theory that there had been an unjust enrichment of Molly, notwithstanding there was no direct and positive evidence of fraud or misrepresentation. In this case, the appellant also urges us to impose a constructive trust on the ground of unjust enrichment. In *Kuhlman v. Cargile, supra*, we held that a constructive trust is a relationship, with respect to property, subjecting the person who holds title to the property to an equitable duty to convey it to another on the ground that his acquisition or retention of the property would constitute unjust enrichment. We specifically stated, however, that each case involving the existence of a constructive

trust is to be determined on the particular facts, circumstances, and conditions presented therein. We did not state that we would impose a constructive trust in every case of alleged unjust enrichment. That is a matter for the determination of the trial judge with respect to whether the facts of the particular case necessitate the imposition of a constructive trust under equitable principles.

We believe that the factual situation contained in *Marco v. Marco*, 196 Neb. 313, 242 N.W.2d 867 (1976), is more similar to the present case. In that case, two sons were in business with their father. One son built a home and another building and the other son made improvements to his home, all of which were located on real property which is owned jointly by their father and their stepmother. All buildings and improvements were purchased with personal funds belonging to the sons. The sons testified that they were told by their father that they would get the property and their own houses and building when he died. They stated that their father told them he did not deed the property to them because if they should be divorced their wives were likely to get the property. In that case this court declined to impose a constructive trust upon the property and, quoting from *Paul v. McGahan*, 152 Neb. 578, 42 N.W.2d 172 (1950), stated as follows: "Constructive trusts arise from actual or constructive fraud or imposition, committed by one party on another. Thus if one person procures the legal title to property from another by fraud or misrepresentation, or by an abuse of some influential or confidential relation which he holds toward the owner of the legal title, obtains such title from him upon more advantageous terms than he could otherwise have obtained it, the law constructs a trust in favor of the party upon whom the fraud or imposition has been practiced." *Id.* at 316, 242 N.W.2d at 871. Although the trial court in the instant case did not specifically pass upon the issue of imposing a constructive trust,

by virtue of the fact that it found generally in favor of the plaintiff and against the defendants, it must have inferentially decided that issue against the defendants. We conclude from a review of the evidence in the case that the trial court was correct in not imposing a constructive trust upon the property in question under the facts existing in the record which has been reviewed by us. This is particularly true considering the fact that there is not one scintilla of evidence in the record to substantiate Edward's claim that Bernard J. Guynan, his father, had promised to give him the real estate during his lifetime. We conclude that Edward's first assignment of error is without merit.

We reach the same conclusion with regard to Edward's second assignment of error in which he claims a resulting trust in the property. We believe there is even less evidence to justify a resulting trust than to establish a constructive trust. A resulting trust is a trust created by act or construction of law; in its more restricted sense, and contradistinguished from a constructive trust, it is one raised by implication of law and presumed to have been contemplated by the parties, their intention as to which is to be found in the nature of their transactions but not expressed in the instrument of conveyance. It is generally held that the foundation of resulting trusts lies in the ownership and payment of purchase money by one when title is taken in the name of another. *Norton v. Brink*, 75 Neb. 575, 110 N.W. 669 (1906); *Cowles v. Cowles*, 89 Neb. 327, 131 N.W. 738 (1911). The payment of consideration is the key issue. There is clearly no resulting trust arising from the facts of this case, and Edward's second assignment of error is without merit.

We now address appellant's claim to the premises in question based upon adverse possession. We note at the outset that this issue was not raised or addressed before the trial court, but rather is raised for

the first time on appeal. The rule is well settled that questions not presented or passed upon by the trial court will not be considered by this court on appeal. *Powers v. Chizek*, 204 Neb. 759, 285 N.W.2d 501 (1979); *State Fire Marshal v. Schaneman*, 203 Neb. 413, 279 N.W.2d 101 (1979); *Von Seggern v. Freeland*, 200 Neb. 570, 264 N.W. 2d 436 (1978). This court will not decide an issue raised for the first time on appeal. *Edquist v. Commercial Sav. & Loan Assn.*, 191 Neb. 618, 217 N.W.2d 82 (1974). However, even if the issue were before us in this appeal, we think it is clear that it is without merit. Without discussing in detail the required elements to establish adverse possession, we need only state that it is clear from the record in this case that the possession of Edward of the premises in question is, at the most, permissive in character, and not adverse either to his father or mother. There is no evidence that his original permissive use ever changed to a hostile use sufficient to support a claim of adverse possession. The law is well established that possession by permission of the owner can never ripen into title by adverse possession unless the change of such possession has been brought home to the adverse party. *McDermott v. Boman*, 165 Neb. 429, 86 N.W.2d 62 (1957). Even after his mother received title to the property in question under the will of Bernard J. Guynan, Edward's possession remained permissive and, so far as the record discloses, was not adverse to his mother until he refused his mother's demand for possession approximately 2 years prior to trial. The requisite 10-year period for adverse possession had not expired at the time the action was commenced.

We are convinced from a review of the record that notwithstanding the claims of the appellant that his father had promised and agreed to convey the property to him, there is nothing in the record to substantiate his claim. The evidence that appears in this regard is Edward's testimony on direct examination, as follows: "Q. During your father's lifetime did

you think that he would convey it to you? A. Yes. He told me he would. MR. LANE: Objected to and ask that it be stricken, Your Honor. THE COURT: The objection is sustained, and the answer is stricken." There is nothing further in the record whatsoever which would substantiate Edward's claim that his father promised to convey the property to him, unless it be the fact that Edward did build the house upon the property with his father's apparent permission. In his cross-petition Edward prays, in addition to asking the court to impose a constructive trust upon the property, that the court order the plaintiff to convey the said premises to him "and for such other, further and different relief as to the court may seem just and equitable." It therefore would appear that Edward is claiming the property in question under an alleged oral contract with his father. In this connection, we have held that when one claims an estate of a deceased person under an alleged oral contract, the evidence of such agreement must be clear, satisfactory, and unequivocal. *Eagan v. Hall*, 159 Neb. 537, 68 N.W.2d 147 (1955); *Wyrick v. Wyrick*, 162 Neb. 105, 75 N.W.2d 376 (1956); *Vermaas v. Fagan*, 167 Neb. 465, 93 N.W.2d 381 (1958); *Kimmel v. Roberts*, 179 Neb. 8, 136 N.W.2d 208 (1965). We have also held that one seeking specific performance of an oral contract to leave property to another has the burden of not only proving the contract but also that he has performed the obligations imposed upon him thereby. *Sopcich v. Tangeman*, 153 Neb. 506, 45 N.W.2d 478 (1951); *Drew v. Hawley*, 164 Neb. 141, 82 N.W.2d 4 (1957).

In connection with oral contracts to convey real estate, we must also consider the requirements of our statute of frauds relative to conveyances of real estate. Neb. Rev. Stat. § 36-103 (Reissue 1978) provides: "No estate or interest in land, other than leases for a term of one year from the making thereof, nor any trust or power over or concerning lands, or in any manner

relating thereto, shall hereafter be created, granted, assigned, surrendered, or declared, unless by operation of law, or by deed of conveyance in writing, subscribed by the party creating, granting, assigning, surrendering or declaring the same." It is clear that in this case there was no writing of any nature subscribed by any of the parties. Neb. Rev. Stat. § 36-104 (Reissue 1978) also provides: "Section 36-103 shall not be construed to affect in any manner the power of a testator in the disposition of his real estate by a last will and testament, nor to prevent any trust from arising or being extinguished by implication or operation of law." As will be noted above, we have disposed of the contention that a trust was created in this property, and also that no challenge was made with reference to the effect of the testator's will under which Anne elected to take a fee simple interest in the property in question. Finally, we note that Neb. Rev. Stat. § 36-106 (Reissue 1978) provides: "Nothing contained in sections 36-101 to 36-106 shall be construed to abridge the powers of a court of equity to compel the specific performance of agreements in cases of part performance." However, we have also held that before specific performance of an oral contract to convey real estate will be decreed, the acts claimed to be in part performance themselves must unequivocally indicate the existence of the contract. *Crnkovich v. Crnkovich*, 144 Neb. 904, 15 N.W.2d 66 (1944).

Our review of the record convinces us that there was no oral contract between Edward and his father that Edward's father would leave him the property, nor, as previously indicated, was there any evidence of a promise by the father to do so.

The record shows that Edward received the permission of his father to build the basement house on the property in 1955, and at no time during his father's life did Edward make a claim to the property in question. In fact, the appellant testified at trial

that he was aware of the fact that a home which is attached to real estate normally becomes part of the freehold. Upon the death of his father in 1970, Edward was named special administrator of his father's estate. The record shows that at no time during the probate proceedings did Edward ever make claim to the property in question. In fact, he testified that he was the special administrator who helped compile the inventory of assets from which his mother, Anne, made her election as to the property under the provisions of said will. No claim to the property in question was made at that time, nor did Edward challenge his mother's right to elect said property under the terms of the will. In light of his failure to assert his claim to the premises at the time of probate, it is difficult to conceive how Edward can now claim that the property belongs to him under an alleged oral agreement with his father.

In light of the record before us, we conclude that Edward has not met his burden of establishing an oral agreement to devise the property in question, and, therefore, he is not entitled to specific performance of such alleged contract, nor is he entitled to have a trust imposed thereon.

For the reasons stated, the judgment of the trial court ordering the defendants to deliver possession of the real estate to plaintiff must be, and hereby is, affirmed.

AFFIRMED.

WILLIAM P. WINTER, JR., APPELLANT, V. HARRY (PETE) PETERSON, DIRECTOR OF THE DEPARTMENT OF MOTOR VEHICLES, STATE OF NEBRASKA, APPELLEE.

305 N.W.2d 803

Filed May 15, 1981. No. 43328.

1. **Implied Consent Law: Blood, Breath, and Urine Tests: Right to Counsel.** Under the Nebraska implied consent statutes a driver is not entitled to consult with a lawyer prior to taking a test, nor is the test required to be delayed by a request of an arrested motorist that he be permitted to contact a lawyer.
2. **Implied Consent Law: Blood, Breath, and Urine Tests.** A single request to submit to a test is sufficient. There is no requirement that a second request be made if the person arrested refuses to submit to the test.
3. ____: ____. A conditional or qualified refusal to take a test to determine the alcohol content of body fluids under the implied consent law is not sanctioned by the act and such refusal is a refusal to submit to the test within the meaning of the act.
4. ____: ____. A refusal to submit to a chemical test occurs within the meaning of the implied consent law when the licensee, after being asked to submit to a test, so conducts himself as to justify a reasonable person in the requesting officer's position in believing that the licensee understood that he was asked to submit to a test and manifested an unwillingness to take it.
5. ____: ____. To constitute a refusal to submit to a chemical test required under the implied consent statute, the only understanding required by the licensee is an understanding that he has been asked to take a test. It is no defense to refusal that he does not understand the consequences of refusal or is not able to make a reasoned judgment as to what course of action to take.

Appeal from the District Court for Buffalo County: DEWAYNE WOLF, Judge. Affirmed.

Greg C. Harris of Munro & Munro, P.C., for appellant.

Paul L. Douglas, Attorney General, and Linda A. Akers for appellee.

Heard before BOSLAUGH, MCCOWN, CLINTON, and BRODKEY, JJ., and MARTIN, District Judge.

McCOWN, J.

The appellant appeals from a judgment of the District Court for Buffalo County affirming an order of the Director of the Department of Motor Vehicles revoking the appellant's driver's license for 6 months under the implied consent law.

The facts in this case were stipulated and are not in dispute. An officer of the Kearney Police Department placed the appellant under arrest at approximately 1:45 a.m., November 9, 1978, for the offense of driving while under the influence of alcohol. The officer transported the appellant directly to the Kearney police station for the purpose of having the appellant submit to a breath test. Upon arrival at the Kearney police station at approximately 1:50 a.m., the appellant was read the implied consent form and the officer asked the appellant to submit to a Breathalyzer test. The consent form embodied the information required under the implied consent law but did not contain *Miranda* warnings, nor any reference to any right to counsel. The appellant did not submit to the test at that time but asked permission to call his attorney. Appellant's attorney arrived at the police station shortly thereafter and, after a delay of 5 or 10 minutes, conferred with the appellant, and the appellant then requested that the test be administered and stated that he would sign the implied consent form. The officer then refused to give the test for the reason that the appellant had already refused. It was then 2:25 a.m.

It was further stipulated that the amount of alcohol metabolized by the appellant during the 35-minute waiting time was not more than .009 of 1 percent.

The District Court found that the appellant refused to take the test when requested and that the request was properly made with the required warnings given to the appellant as to the consequences of refusing to submit. The District Court affirmed the

order of revocation and this appeal followed. We affirm the judgment of the District Court.

The appellant rests his contentions here on the case of *Sedlacek v. Pearson*, 204 Neb. 625, 284 N.W.2d 556 (1979). The facts in that case are essentially the same as the facts in this case up to the point at which the driver, after a conditional refusal and a delay to consult counsel, later requested that the test be administered. In *Sedlacek* the test was administered on the second occasion and Sedlacek was then charged with driving while under the influence of alcohol based on the results of the test, and also with refusal to submit to a test under the implied consent law. This court held that in a proceeding before the Director of the Department of Motor Vehicles under the implied consent law, where the evidence shows that a test was in fact performed which established a blood alcohol content in excess of that prescribed by statute, the sanction prescribed by the statute for refusal to consent to the test should not be imposed. *Sedlacek* recognized that the preliminary request to consult with a lawyer constituted a conditional refusal to submit to the test, although it recognized the fact that a subsequent request by the driver to take the test might be granted by the police and the test given. *Sedlacek* does not apply to a case in which no test was given.

This court has consistently recognized that under the Nebraska implied consent statutes a driver is not entitled to consult with a lawyer prior to taking a test, nor is the test required to be delayed by a request of an arrested motorist that he be permitted to contact a lawyer. See, *Stevenson v. Sullivan*, 190 Neb. 295, 207 N.W.2d 680 (1973); *Wiseman v. Sullivan*, 190 Neb. 724, 211 N.W.2d 906 (1973).

A single request to submit to a test is sufficient. There is no requirement that a second request be made if the person arrested refuses to submit to the test.

Heffernan v. Kissack, 192 Neb. 637, 223 N.W.2d 486 (1974).

A conditional or qualified refusal to take a test to determine the alcohol content of body fluids under the implied consent law is not sanctioned by the act and such refusal is a refusal to submit to the test within the meaning of the act. *Wohlgemuth v. Pearson*, 204 Neb. 687, 285 N.W.2d 102 (1979).

A refusal to submit to a chemical test occurs within the meaning of the implied consent law when the licensee, after being asked to submit to a test, so conducts himself as to justify a reasonable person in the requesting officer's position in believing that the licensee understood that he was asked to submit to a test and manifested an unwillingness to take it. *Wohlgemuth v. Pearson, supra.*

To constitute a refusal to submit to a chemical test required under the implied consent statute, the only understanding required by the licensee is an understanding that he has been asked to take a test. It is no defense to refusal that he does not understand the consequences of refusal or is not able to make a reasoned judgment as to what course of action to take. *Wohlgemuth v. Pearson, supra.*

In the case at bar the appellant's request to consult with an attorney constituted a qualified or conditional refusal to take the test, and the police officer, the Director of the Department of Motor Vehicles, and the District Court all found that there was a refusal to take the test. The only issue here is whether there was a refusal to take the test, and the issue of possible prejudice to the State from the delay is immaterial.

The judgment of the District Court was correct and is affirmed.

AFFIRMED.

LYNETTE LUM, APPELLANT, V. DENNIS MATTLEY ET AL., APPELLEES.

305 N.W.2d 878

Filed May 15, 1981. No. 43364.

1. **Records: Appeal and Error.** Where there is no bill of exceptions on appeal, this court is limited to a determination of whether the pleadings support the judgment of the trial court.
2. **Adoption.** In the absence of threats, coercion, fraud, or duress, a properly executed relinquishment of parental rights and consent to adoption form signed by a natural parent knowingly, intelligently, and voluntarily is valid.
3. ____ A valid relinquishment terminates voluntarily the signer's parental rights, including the superior right of a fit and proper parent to custody of the child.
4. ____ A natural parent seeking to revoke a valid relinquishment has the burden of showing that the best interests of the child require revocation.
5. **Records: Appeal and Error.** In the absence of a bill of exceptions, the findings of the trial court with respect to the best interests of the child must be taken as correct.
6. **Habeas Corpus: Jurisdiction: Courts: Adoption.** The determination by the District Court in a habeas corpus case does not control the proper exercise of the jurisdiction of the county court in a later adoption proceeding.

Appeal from the District Court for Box Butte County: ROBERT R. MORAN, Judge. Affirmed.

Mary L. Zemyan of Western Nebraska Legal Services for appellant.

Paul D. Empson for appellee.

Heard before KRIVOSHA, C.J., BOSLAUGH, MCCOWN, CLINTON, BRODKEY, WHITE, and HASTINGS, JJ.

WHITE, J.

Plaintiff, Lynette Lum, the natural mother of Ruby Nohelani Lum, a child born out of wedlock on November 21, 1979, brought an action in habeas corpus in the District Court for Box Butte County, Nebraska, alleging that a relinquishment signed January 15, 1980, in favor of Dennis R. and Virginia M. Mattley,

a married couple, was void because it was obtained by threats, coercion, and fraud and that the best interests of the child required that the plaintiff mother regain custody. Dennis R. and Virginia M. Mattley answered, admitting custody and denying all other allegations of the petition. The trial court found for the defendants. Plaintiff appeals.

Plaintiff assigns two errors: (1) That the trial court erred in determining that, while a natural mother may revoke her relinquishment and consent to adoption at any time prior to the adoption, the right is subject to the court's determination that the return of the custody to the natural mother is in the best interests of the child; and (2) That the trial court erred in not holding that a natural mother who has relinquished custody is entitled to return of the child's custody before adoption absent an affirmative finding of unfitness.

We note the absence of a bill of exceptions. Under our cases, where there is no bill of exceptions the court is limited to a sole question: whether the pleadings support the judgment of the trial court. *Pauley v. Scheer*, 168 Neb. 343, 95 N.W.2d 672 (1959); *Bednar v. Bednar*, 146 Neb. 726, 21 N.W.2d 438 (1946).

The trial court in its findings held that the relinquishment was voluntary and that plaintiff was neither coerced nor subjected to duress. The plaintiff does not question those findings here and they will not be further discussed.

Implicit in the question of whether the pleadings support the findings of the court is the determination of the extent of the right, if any, of a parent, after a valid relinquishment to a private person has been executed and custody delivered, to revoke the relinquishment and compel the delivery of the child.

The District Court here found that the relinquishment signed by plaintiff was made knowingly, intelligently, and voluntarily, without threats, coercion, fraud, or duress. In addition, the relinquish-

ment form appears to be valid on its face. Thus, we find that the relinquishment of parental rights and consent to adoption form signed by plaintiff is valid.

Under Nebraska law, our focus now shifts to the best interests of the child in determining the right to custody. The rule in Nebraska is that a natural parent "can, by agreement, surrender the custody of his infant children to another, so as to make the custody of that other legal, and he cannot thereafter repudiate such agreement and retain the custody of the children, unless he can show a clear breach of the agreement, or an abuse of the child, or that the best interest of the child requires it." *State v. Nebraska Children's Home Society*, 94 Neb. 255, 263, 143 N.W. 203, 206 (1913). In the wake of a valid relinquishment, then, it is incumbent upon the petitioner to show that the best interests of the child *require* that it be returned to her custody.

We are convinced that this is the proper rule to follow in cases such as the present one. In *Contreras v. Alsidez*, 200 Neb. 773, 775, 265 N.W.2d 452, 453 (1978), a habeas corpus action in which there had been no voluntary relinquishment of parental rights, we noted that: "'When a controversy arises as to the custody of a minor child between a parent and a third person, the custody of the child is to be determined by the best interests of the child with due regard for the superior rights, as between the parties, of a fit, proper, and suitable parent.'"

However, by the terms of the valid relinquishment in the present case, petitioner has voluntarily terminated her own parental rights, including "the superior rights . . . of a fit, proper, and suitable parent." Thus, petitioner's parental rights are no longer in issue here and the parties now stand on an equal footing with respect to determining custody. The rule of *State v. Nebraska Children's Home Society, supra*, properly shifts our focus now to the best interests of the child. The party demanding that custody be

changed naturally must bear the burden of affirmatively demonstrating that "the best interests of the child require" that she regain custody.

The rule's focus on the child's best interests recognizes that it is the child who will bear the brunt of the impact of revoking a valid relinquishment, by being uprooted and shifted from home to home. To focus instead upon any "right" of a relinquishing parent to change her mind would ignore the fact that parental rights are no longer an issue after a valid relinquishment and would further abrogate our responsibility to the best interests of the child. Even parental rights which are fully intact are not inalienable because of the "paramount interest" of society in the protection of the child's best interests. *State v. Duran*, 204 Neb. 546, 554, 283 N.W.2d 382, 387 (1979). Where, as here, parental rights are no longer at issue, the best interests of the child can be our only concern in determination of custody. Thus, the trial court was correct in requiring that petitioner make an affirmative showing that the child's best interests require her return to petitioner, and the assignments of error are without merit.

The trial court made detailed findings with respect to the best interests of the child requiring custody to remain with the prospective adoptive parents. In the absence of a bill of exceptions, those findings must be taken as correct.

The determination by the District Court in this habeas corpus case does not in any fashion control the proper exercise of the jurisdiction of the county court in the adoption proceeding itself.

The judgment of the District Court in this habeas corpus action is affirmed.

AFFIRMED.

KRIVOSHA, C.J., dissenting.

I find that I must dissent from the majority in this case. We have today decided the case of *Kellie v.*

Lutheran Family & Social Services, *ante* p. 767, 305 N.W.2d 874 (1981). In the *Kellie* case we held that if the adoption involved a licensed agency a natural parent could revoke an earlier executed relinquishment of her child if done before the adopting agency had accepted full responsibility for the child as required by statute. In doing so, we said at 772, 305 N.W.2d at 877: "Basic principles of offer and acceptance, as well as the statute, dictate that result."

In the instant case, we have now, in effect, held that while what we said in *Kellie* may be true with regard to a licensed agency, the situation with regard to a private placement is otherwise. I think the distinction is not valid.

The obvious intent of the statute with regard to the licensed agency is to ensure that the licensed agency accepts the responsibility of caring for the child once the child's custody is taken by the agency. Even if the agency is unable to find an appropriate home and adoptive parents for the child, it will remain responsible for the child.

Why do we require something less when dealing with a private adoption? If, as the majority in *Kellie* has suggested, principles of contract such as "offer and acceptance" apply, then why should we not also impose principles of contract such as "mutuality"? Under the majority view in this case, if the proposed adoptive parents change their minds prior to the time that the county court enters an order approving the adoption, the proposed parents incur no liability or responsibility and, at their option, may either return the child to the natural parent or turn the child over to the state as a child without parent or home. How can the natural parent, on the one hand, be bound while the adoptive parent, on the other, is without any binding obligation? I would hold that the natural parent in a private placement has the right to withdraw the relinquishment until the county court has approved the adoption and made the adop-

tive parents responsible for the child. I am not unmindful of the fact that this would introduce a measure of uncertainty into the private placement as opposed to the certainty of the licensed agency. That, in and of itself, may not be such a bad result for either the natural parents who are giving up their child or the child itself, both of whom should be assured that under any circumstance the person or entity selected by the natural parents will remain legally responsible for the child until another person or entity is approved by the county court. I would have found for the appellant and held that the attempt to revoke the relinquishment was effective.

JOSEPH KRAMER, APPELLANT, V.
DOUG SWANSON, DOING BUSINESS AS
MID-STATE BUILDING AND SUPPLY CO., ET AL.,
APPELLEES.

305 N.W.2d 806

Filed May 15, 1981. No. 43449.

1. **Summary Judgment: Motions for New Trial: Appeal and Error.** In an appeal from an order granting a motion for summary judgment, a motion for new trial is necessary in order for the court on appeal to review alleged errors in evidence.
2. **Motions for New Trial: Appeal and Error.** When a motion for new trial is not filed in a law action, the court on appeal will examine the record only for the purpose of determining whether or not the judgment of the trial court is supported by the pleadings.
3. **Pleadings.** Exhibits not identified as an attachment to any pleading nor as part of an order or entry of any kind are not part of the pleadings.

Appeal from the District Court for Logan County: KEITH WINDRUM, Judge. Affirmed.

John O. Sennett for appellant.

Kay & Kay for appellees.

Heard before KRIVOSHA, C.J., MCCOWN, WHITE, and HASTINGS, JJ., and MORAN, District Judge.

WHITE, J.

The plaintiff-appellant, Joseph Kramer, brought this action in the District Court for Logan County, Nebraska, against the defendants-appellees, Doug Swanson, doing business as Mid-State Building and Supply Co., and Chief Industries, Inc. (hereafter Chief). Plaintiff alleged in his petition that he purchased a grain storage building for installation on his farm, which was manufactured, constructed, and sold by the defendant Chief through its agent, defendant Swanson, and that defendant Chief had breached express and implied warranties as to fitness for the particular purpose requested by plaintiff, i.e., grain storage, since, after grain was stored in the building, the building leaked, the sides began to bulge, and the doors did not work properly, resulting in damage to the plaintiff. Defendant Chief filed a general denial and then a motion for summary judgment. The trial court granted Chief's motion for summary judgment based on findings that Swanson was not Chief's agent and that no warranties had been made or breached by Chief. We affirm.

We note at the outset that plaintiff failed to file a motion for new trial. In an appeal from an order granting a motion for summary judgment, a motion for new trial is necessary in order for the court on appeal to review alleged errors in evidence. *Valentine Production Credit Assn. v. Spencer Foods, Inc.*, 196 Neb. 119, 241 N.W.2d 541 (1976); *Ingersoll v. Montgomery Ward & Co., Inc.*, 171 Neb. 297, 106 N.W.2d 197 (1960). When a motion for new trial is not filed in a law action, the court on appeal will examine the record only for the purpose of determining whether or not the judgment of the trial court is supported by the pleadings. *Sempek v. Sempek*, 198 Neb. 300, 252 N.W.2d 284 (1977); *Nebraska Children's Home*

Soc. v. Collins, 195 Neb. 531, 239 N.W.2d 258 (1976). Exhibits not identified as an attachment to any pleading nor as part of an order or entry of any kind are not part of the pleadings. *Connor v. State*, 175 Neb. 140, 120 N.W.2d 916 (1963).

The allegations in plaintiff's petition amount to a claim that because Swanson was allegedly an agent of Chief, both Chief and Swanson are liable for the defective construction of the building. It is undisputed that the materials which were furnished by Chief were not defective. However, the contract between plaintiff and defendant Swanson, which is incorporated in the petition, does not support the allegation of agency. Nothing in the contract mentions Chief, nor does it even state that the structure to be sold to plaintiff was to be a Chief building. Although the contract does refer to defendant Swanson as an authorized vendor of farm grain storage buildings, it does not elaborate as to the source of this authority and certainly does not give any indication of an agency relationship between Swanson and Chief. This document appears to constitute the entire agreement between plaintiff and Swanson, and we therefore find nothing in the pleadings to support a claim of agency.

Similarly, plaintiff's petition contains certain statements which it alleges were warranties in the form of representations made by Chief as to the fitness of the building for grain storage. Nowhere does the contract between plaintiff and Swanson allude to any such representations by Chief, and nothing else contained in the pleadings, apart from the bare allegation, demonstrates that such representations were ever made or breached by Chief.

We find that the judgment of the trial court is supported by the pleadings and thus affirm the granting of summary judgment in favor of Chief.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. WILLIE AMMONS, APPELLANT.

305 N.W.2d 808

Filed May 15, 1981. No. 43450.

1. **Criminal Defendants: Witnesses.** Just as an accused has the right to confront the prosecution's witnesses for the purpose of challenging their testimony, he has the right to present his own witnesses to establish a defense. This right is a fundamental element of due process of law.
2. ____:____ The constitutional right of a defendant to call witnesses in his defense mandates that they must be called without intimidation.
3. **Prosecuting Attorneys: Witnesses.** A prosecutor may impeach a witness in court but he may not intimidate him in or out of court.

Appeal from the District Court for Douglas County: JAMES M. MURPHY, Judge. Reversed.

Rodney W. Smith for appellant.

Paul L. Douglas, Attorney General, and G. Roderic Anderson for appellee.

Heard before KRIVOSHA, C.J., BOSLAUGH, MCCOWN, CLINTON, BRODKEY, WHITE, and HASTINGS, JJ.

MCCOWN, J.

The defendant was found guilty by a jury of robbery and use of a firearm in the commission of a felony, and was sentenced to imprisonment for not less than 8 nor more than 15 years on the robbery count and not less than 2 nor more than 3 years on the firearm count, the sentences to run consecutively.

On November 6, 1979, a Safeway store in Omaha, Nebraska, was robbed by two black males. One man approached the courtesy booth in a corner of the store with a gun and demanded all the money from the clerk in the booth. The clerk put $700 to $800 in an envelope and the robber left the store with his accomplice, who had been standing a few feet away. The man with the gun was described as being approximately 5 feet 6 inches tall and weighing approximately 140 pounds. The accomplice was described as quite a bit

taller, 6 feet at least and perhaps 6 feet 2 inches. The robbery took approximately 3 minutes and the only evidence against the defendant was the eyewitness testimony of the clerk in the courtesy booth.

Following the robbery the clerk called the police and gave them a description of the robbers. The day following the robbery the clerk was shown a spread of approximately 8 to 10 photographs of police suspects. The clerk picked a photograph of Glen Harrington as looking like the robber, but made no positive identification. No police record was kept as to what other pictures were included in the spread, nor whether the defendant's picture was included. On November 29, 1979, the clerk viewed a police lineup of four black males. Michael Harrington, a brother of Glen Harrington, was one of the individuals in the lineup. The clerk was unable to identify anyone in the lineup. Both Glen and Michael Harrington are approximately the same height and size as the defendant. On December 4, 1979, the clerk was again shown a spread of eight police photographs. The clerk picked one photograph as a possible suspect but could not make a positive identification. On December 19, 1979, the police held a lineup of three individuals, including the defendant. The defendant was the only short man in the lineup. The clerk immediately identified the defendant as the man with the gun who had robbed him, and identified him again at preliminary hearing and at the trial. He testified that his identification was based on his observation of the defendant at the time of the robbery.

An information against the defendant was filed and on January 10, 1980, a plea of not guilty was entered and the cause was set for trial to the next jury panel. On March 7, 1980, the defendant filed a motion to suppress all pretrial identifications of the defendant, and the motion was scheduled for hearing on March 24, 1980. On March 11, 1980, the defendant was advised that his case would be called for trial

the following morning and suppression hearing would be held prior to the commencement of trial. The defendant made a motion for continuance which was overruled on March 12, 1980, together with the motion to suppress identifications.

Trial commenced and the State presented its case which rested entirely on the identification of the defendant by the clerk. At the conclusion of the State's case a hearing was held in chambers outside the presence of the jury and a record made of the proceedings. The prosecutor, defendant and his counsel, and a prospective witness, Michael Harrington, and his counsel were present. At the request of the defendant, Harrington had been brought to court from the penal complex where he was incarcerated.

Harrington's counsel stated that he had been notified a day or two previously that the defendant intended to call Harrington as a witness, and that he understood that the testimony of Harrington, if he took the stand, would incriminate him with respect to the offense for which the defendant was being tried. He also stated that Harrington was presently serving a 3-year sentence in the penal complex which began approximately 1 month before. Harrington's counsel also stated that that sentence was the result of pleading guilty to the charge of assault in the second degree and that there was an agreement made with the prosecutor in that case that two burglaries would be dismissed, and further that Harrington would clear up some robberies in which he was a suspect. Harrington's counsel also stated, and Harrington confirmed, that in Harrington's discussions with the prosecutor in the assault case he admitted his guilt in the robbery for which the defendant was being tried, and was assured by that prosecutor that no prosecution would result as long as he pleaded guilty to the second degree assault.

The trial judge in this case, who had also been the judge at the time of Harrington's guilty plea, in

response to an inquiry by Harrington, stated that his recollection was: "If you pled guilty to that charge, no other charge would be filed. That was the agreement, as I understood it, between you and the State."

Harrington's counsel had advised Harrington that he was not positive whether or not the State would treat Harrington's testifying in this case as a nullification of the agreement and file charges against Harrington based on the admissions he made on the witness stand, and that he had advised Harrington that the only way he could assure him there would be no prosecution would be for Harrington to take the fifth amendment if he was called as a witness.

The trial judge explained to Harrington that the court had nothing to say about whether the State brought a charge or not and that such decisions were entirely up to the prosecution, and advised Harrington that he could not tell him whether or not the county attorney was going to file a charge if Harrington testified. The prosecutor then stated for the record that the State would prosecute. The prosecutor stated his feeling that any agreement the prosecutor in the Harrington case made was "out the window" if Harrington took the stand in the present case and testified in open court that he committed the robbery.

Harrington then decided that he would take the fifth amendment and refuse to answer any questions. The prosecutor requested that Harrington not be sworn in front of the jury, and the court asked Harrington if he was called as a witness would he refuse to answer any questions about the robbery involved in this case, and upon receiving Harrington's affirmative answer, stated that Harrington had invoked his constitutional privilege, and concluded the hearing.

When the trial resumed the defendant took the stand as the only witness for the defense and denied any knowledge of or participation in the crime. He also testified that he had previously been convicted of two felonies. The jury returned a verdict of guilty and this

appeal followed.

The defendant contends that the failure to grant immunity to the witness Harrington and the actions of the prosecutor in threatening Harrington with prosecution if he took the stand and admitted committing the robbery improperly interfered with the fact-finding process and denied the defendant a fair trial. The essence of defendant's argument in this court is that the trial judge should have granted immunity to the witness Harrington. That issue was not raised at the trial level, but even if it had been such claims for defense witness immunity have been almost uniformly rejected by the courts. See *United States v. Alessio*, 528 F.2d 1079 (9th Cir. 1976), *cert. denied* 426 U.S. 948, 96 S. Ct. 3167, 49 L. Ed. 2d 1184 (1976).

The valid basis for objection here is not that the court failed to grant Harrington immunity as a witness. Instead, the issue is whether or not the prosecution intimidated Harrington and caused him to refuse to testify as a witness. The constitutional right of a defendant to call witnesses in his defense mandates that they must be called without intimidation. A prosecutor may impeach a witness in court but he may not intimidate him in or out of court. See *People v. Pena*, 383 Mich. 402, 175 N.W.2d 767 (1970). The principles set out in *Pena* were approved in the very recent case of *State v. Ivy*, 300 N.W.2d 310 (Iowa 1981). In that case, although the court declined to reverse the conviction because of the absence of prejudice, the court said: "We agree with the rationale of these cases which hold it is improper to intimidate a witness. We agree, too, that, if prejudice results, a defendant is deprived of due process." *Id.* at 314.

The foundational case for establishing the right of a defendant to present his own witnesses to establish a defense as a fundamental element of due process of law under the sixth amendment right to compulsory process is *Washington v. Texas*, 388 U.S. 14, 87 S. Ct. 1920, 18 L. Ed. 2d 1019 (1967). That case held that

just as an accused has the right to confront the prosecution's witnesses for the purpose of challenging their testimony, he has the right to present his own witnesses to establish a defense. This right is a fundamental element of due process of law.

Typical of cases holding that where the government has prevented a defendant's witness from testifying freely before the jury it cannot be held that the jury would not have believed the testimony or that the error is harmless is *United States v. Morrison*, 535 F.2d 223 (3d Cir. 1976). In that case the prosecutor repeatedly warned a prospective defense witness about the possibility of a perjury charge if she testified falsely, where charges against her in the matter had previously been dropped when it was disclosed that she had been under 18 years old at the time. She understood that with the dropping of the charges she was free from prosecution for her role, which was not true. In that case the Third Circuit not only reversed the defendant's conviction but held that where prosecutorial misconduct caused the defendant's prime witness to withhold, out of fear of self-incrimination, testimony which would otherwise have been available to the defendant, due process demanded that the government at a new trial request use immunity for that witness.

The same principles which apply to prosecutorial intimidation were also applied to intimidation of a single defense witness by a judge in the case of *Webb v. Texas*, 409 U.S. 95, 93 S. Ct. 351, 34 L. Ed. 2d 330 (1972). In that case the Supreme Court of the United States concluded that the judge's threatening remarks directed only at the single witness for the defense effectively drove that witness off the stand and thus deprived the petitioner of due process of law under the fourteenth amendment.

In *United States v. Thomas*, 488 F.2d 334 (6th Cir. 1973), the court held that the actions of the prosecutor, in gratuitously admonishing a witness of the possibility

that he might be prosecuted for misprision of felony if he testified, constituted prejudicial error, even though evidence of defendant's guilt was overwhelming. The court also held that the government's later statement that the witness would not be prosecuted was not sufficient to overcome the prejudice. The court held that the action of the prosecutor involved in that case substantially interfered with any free and uninhibited determination the witness might have made as to whether to testify and, if so, the content of that testimony.

In the case at bar the record is clear that the prosecutor's threat to Harrington caused Harrington to refuse to testify and resulted in depriving the defendant of that testimony. Courts are divided as to whether reversal is required for intimidation in the absence of a showing of prejudice. In the case at bar the prejudice is clear. Where the only real issue in the case involved the identification of the robber and a witness was prevented from testifying that he was the robber, it is difficult to imagine a clearer case of prejudice.

It is unnecessary to discuss the remaining issues raised by the defendant in this appeal.

REVERSED.

CLINTON, J., dissents.

HASTINGS, J., concurring.

I concur with the result reached by the majority on the ground, and only on the ground, that the State failed to honor what I believe was an enforceable plea bargain. I do not want to suggest that a judge or prosecutor who warns a witness of the possibility of self-incrimination or of the penalties for perjury has engaged in witness intimidation.

BOSLAUGH, J., joins in this concurrence.

RICHARD E. REEVES, APPELLEE, V. BRIAN R. WATKINS, APPELLANT.

305 N.W.2d 815

Filed May 15, 1981. No. 43467.

1. **Quantum Meruit: Pleadings.** A party cannot recover upon a quantum meruit where he pleads and relies during the trial solely upon an expressed contract.
2. **Mechanics' Liens.** A contractor cannot successfully assert a mechanic's lien upon property where there has been only part performance or a lack of substantial performance of the contract.
3. ——. Objections which go to the validity or existence of the lien or the debt on which it is based may be set up in defense to an action to enforce the lien, and damages for the lienholder's default in performance under the contract giving rise to the debt and lien may be set up to defeat the lien or to reduce the amount collected under it.
4. **Trial: Judicial Notice.** Where cases are interwoven and interdependent and the controversy involved has already been considered and determined in a prior proceeding involving one of the parties now before the court, the court has the right to examine its own records and take judicial notice of its own proceedings and judgment in the prior action.
5. **Collateral Estoppel.** Collateral estoppel may be applied if the identical issue was decided in a prior action, there was a judgment on the merits which was final, the party against whom the rule is to be applied was a party or in privity with the party to the prior action, and there was an opportunity to fully and fairly litigate the issue in the prior action.
6. **Summary Judgment.** The primary purpose of the summary judgment statute is to pierce sham pleadings and to dispose of, without the necessity and expense and delay of trial, those cases where there is no genuine claim or defense.

Appeal from the District Court for Lancaster County: DONALD E. ENDACOTT, Judge. Affirmed.

Steven D. Keist of Watkins, Osborne, Scott & Keist for appellant.

James M. Kelley of Kelley & Thorough for appellee.

Heard before KRIVOSHA, C.J., MCCOWN, WHITE, and HASTINGS, JJ., and RICHLING, District Judge.

KRIVOSHA, C.J.

The appellant, Brian R. Watkins (Watkins), appeals from an order entered by the District Court for

Lancaster County, Nebraska, affirming a previous order entered by the municipal court of the city of Lincoln, Nebraska, sustaining a motion for summary judgment filed by the appellee, Richard E. Reeves (Reeves). We affirm.

The record discloses that Watkins, a partner in a joint venture known as Venture "78" Ltd., personally entered into a contract with Reeves for architectural services in connection with the design and construction of an office complex to be constructed and owned by Venture "78." The contract, as disclosed by the evidence, is a standard AIA Document B141, Owner-Architect Agreement, and contains in Article 8 of the agreement a specific provision for liquidated damages. Article 8 of the agreement provides as follows:

"8.1 This Agreement may be terminated by either party upon seven days' written notice should the other party fail substantially to perform in accordance with its terms through no fault of the party initiating the termination.

"8.2 In the event of termination due to the fault of parties other than the Architect, the Architect shall be paid his compensation for services performed to termination date, including Reimbursable Expenses then due and all termination expenses.

"8.3 Termination Expenses are defined as Reimbursable Expenses directly attributable to termination, plus an amount computed as a percentage of the total compensation earned to the time of termination, as follows: 20 percent if termination occurs during the Schematic Design Phase; or 10 percent if termination occurs during the Design Development Phase; or 5 percent if termination occurs during any subsequent phase."

The evidence further discloses that sometime after the contract between Watkins and Reeves was entered into on July 22, 1978, and before the project was completed, a mortgage foreclosure involving the project property was filed by the United States

National Bank of Omaha against Venture "78" in the District Court for Lancaster County, Nebraska.

Thereafter, Reeves intervened and filed an answer and cross-petition in the mortgage foreclosure. In his cross-petition he alleged the execution of the contract between himself and Watkins and the existence of a valid mechanic's lien which he sought to foreclose. Furthermore, Reeves alleged that he had "performed all of the duties imposed upon him under the terms of the contract evidenced by Exhibit 'A.'" He further alleged, as he was required to do, that he had caused to be filed in the office of the Register of Deeds of Lancaster County, Nebraska, a mechanic's lien which had attached to it a copy of the written agreement between Reeves and Watkins. Watkins answered the cross-petition by filing a general denial.

On May 18, 1979, the District Court for Lancaster County, Nebraska, entered a decree of foreclosure in favor of the United States National Bank as first lienholder. The court further found in its decree that Reeves claimed a lien but that a dispute existed as to the validity of the alleged lien. The court therefore determined that the dispute should be resolved, and if resolved in favor of Reeves, should constitute a third lien against the property, the second lien being in favor of First Savings Company of Lincoln.

The parties then entered into a trial stipulation in the foreclosure action in which Watkins acknowledged executing the agreement with Reeves, and further acknowledged that a mechanic's lien with attachments, including the contract, was filed in the office of the Register of Deeds of Lancaster County, Nebraska. Watkins further stipulated that the joint venture had paid to Reeves, under the terms of the agreement, the sum of $33,674.88.

Trial was then had on the validity of Reeves' mechanic's lien, and on May 29, 1979, judgment was entered by the District Court for Lancaster County, Nebraska, in the foreclosure action in favor of Reeves

and against Watkins. In its judgment, the court specifically found that the mechanic's lien filed by Reeves was a valid mechanic's lien and should be foreclosed against the joint venture for the amount of $1,744.25. The parties acknowledge that the sum included in the mechanic's lien foreclosure did not include any part of the liquidated damages now being sought.

Reeves thereafter filed a petition in the municipal court of the city of Lincoln seeking to recover the termination fee in the amount of 5 percent of $36,043.85 as provided for in Article 8.3 of the contract. By way of answer, Watkins admitted the execution of the contract but denied all of the other allegations of Reeves' petition. Watkins further filed a counterclaim in which he acknowledged that Reeves had previously been paid $36,043.85 but maintained that Reeves had overcharged Watkins and had not given him credit for the overcharge. Furthermore, Watkins alleged that the termination was not due to any act of Watkins but solely due to the acts of Reeves. Watkins also alleged that Reeves had not performed all of the services required to be performed by him in a timely manner and that these delays caused construction cost increases in an amount which Watkins was unable at that time to determine. Watkins further alleged that Reeves failed to perform all of the requirements of the contract, specifically failing to obtain approval of the project by the Lower South Platte Natural Resources District. The contract, however, makes no provision for the work to be done at a specific time, nor does it require the architect to obtain the approval of the Lower South Platte Natural Resources District.

Based in part upon the facts determined between the parties in the mechanic's lien foreclosure and in part on Watkins' admission that he had paid to Reeves the sum of $36,043.85, Reeves filed a motion for summary judgment in the municipal court. The municipal court granted the motion for summary judgment

and Watkins appealed to the District Court. After consideration of the matter, the District Court affirmed the judgment of the municipal court. It is from this order by the District Court for Lancaster County, Nebraska, that Watkins appeals, maintaining that the trial court erred in sustaining the motion for summary judgment.

Specifically, Watkins assigns as error the fact that the court could not and should not have found that Watkins was collaterally estopped from objecting to the validity of the contract by virtue of the decree of foreclosure which related only to "work actually performed" by Reeves and did not decide any issues regarding the validity of the contract and the rights of the parties as to termination charges. Watkins further maintains that the trial court erred in sustaining the motion for summary judgment as there were genuine issues of fact which could not be decided by a motion for summary judgment, though, in his assignment of error, he does not set out what those genuine issues of fact are.

We turn first to Watkins' contention that the findings made by the trial court in the mechanic's lien foreclosure brought by Reeves did not collaterally estop Watkins from denying the enforceability of the contract, including the provisions of Article 8.3.

We believe that Watkins' position is taken by him because he does not fully appreciate the significance of the mechanic's lien foreclosure. Mechanic's liens are purely creatures of statute, and in Nebraska are governed by the provisions of Neb. Rev. Stat. §§ 52-101 et seq. (Reissue 1978). For one to be entitled to a mechanic's lien under the act, the person claiming the lien must perform labor or furnish material "by virtue of an open running account or a contract or agreement, expressed or implied, with the owner thereof or his agents." § 52-101. *Barry v. Barry*, 147 Neb. 1067, 26 N.W.2d 1 (1947). It is clear, therefore, that before one may claim a mechanic's lien, one

must have a contract, expressed or implied. In this case, the mechanic's lien was claimed by virtue of an express, executed contract. Watkins makes some contention that the mechanic's lien foreclosure established only that Reeves had performed work for which he was entitled to recover. Watkins asserts that neither the existence of the written contract nor its validity was determined by the earlier foreclosure action. That, of course, cannot be. Nebraska has traditionally refused to permit one to sue on an expressed contract and recover on an implied contract. We have, on more than one occasion, said that a party cannot recover upon a quantum meruit where he pleads and relies during the trial solely upon an expressed contract. See, 17A C.J.S. *Contracts* § 569a (1963); *Lincoln Service & Supply, Inc. v. Lorenzen*, 171 Neb. 671, 107 N.W.2d 333 (1961); *Starbird v. McShane Timber Co.*, 94 Neb. 79, 142 N.W. 683 (1913); *Dorrington v. Powell*, 52 Neb. 440, 72 N.W. 587 (1897); *Mayer v. Ver Bryck*, 46 Neb. 221, 64 N.W. 691 (1895); *Powder River Live Stock Co. v. Lamb*, 38 Neb. 339, 56 N.W. 1019 (1893). There is no way, therefore, that we could reach any other conclusion except to find that the judgment in the mechanic's lien foreclosure was based upon the trial court's finding that the contract between Watkins and Reeves, attached to the mechanic's lien and sued upon later in the municipal court, was a validly executed document enforceable between Watkins and Reeves.

Moreover, the fact that the court permitted the mechanic's lien to be foreclosed establishes that Reeves proved that he had "performed all of the duties imposed upon him under the terms of the contract," as alleged in his cross-petition in the mechanic's lien foreclosure action. That is so because the general rule is to the effect that "[a] contractor cannot successfully assert a mechanic's lien upon the property where there has been only part performance or a lack of substantial performance of the contract." See, 53 Am.

Jur. 2d *Mechanics' Liens* § 51 (1970); *Bonsall v. Sterrett*, 197 Neb. 753, 250 N.W.2d 910 (1977); *Lincoln Stone & Supply Co. v. Ludwig*, 94 Neb. 722, 144 N.W. 782 (1913); *Hahn v. Bonacum*, 76 Neb. 837, 107 N.W. 1001 (1906). Furthermore, it was incumbent upon Watkins to raise the invalidity or nonperformance of the contract in the mechanic's lien foreclosure. "Objections which go to the validity or existence of the lien or the debt on which it is based may be set up in defense to an action to enforce the lien." 57 C.J.S. *Mechanics' Liens* § 273 (1948). Damages for the lienholder's default in performance under the contract giving rise to the debt and lien may be set up to defeat the lien or to reduce the amount collected under it. See 57 C.J.S. *Mechanics' Liens* § 277 (1948).

We must therefore conclude that following the trial in the District Court involving the mechanic's lien, the trial court found, as a part of foreclosing Reeves' mechanic's lien, that Watkins and Reeves had entered into the written contract pleaded; that Reeves had substantially performed all of the duties imposed upon him under the contract; and that Watkins had no defense to invalidate the agreement. Those findings between these two parties may not again be litigated under the doctrine of collateral estoppel.

In *Johnson v. Marsh*, 146 Neb. 257, 19 N.W.2d 366 (1945), we held that where cases are interwoven and interdependent and the controversy involved has already been considered and determined in a prior proceeding involving one of the parties now before the court, the court has the right to examine its own records and take judicial notice of its own proceedings and judgment in the prior action.

Furthermore, in *Peterson v. The Nebraska Nat. Gas Co.*, 204 Neb. 136, 139, 281 N.W.2d 525, 527 (1979), we said: "Generally, mutuality of estoppel is no longer considered to be a requirement for the application of collateral estoppel. It is now generally held that

collateral estoppel may be applied if the identical issue was decided in a prior action, there was a judgment on the merits which was final, the party against whom the rule is to be applied was a party or in privity with the party to the prior action, and there was an opportunity to fully and fairly litigate the issue in the prior action." The issue of the validity of the contract and its enforceability, having been determined in the mechanic's lien foreclosure, is no longer open to debate in the action in the municipal court.

The mere fact that Watkins maintains that a trial may disclose some genuine issue of fact is not sufficient to prevent the court from entering summary judgment. In *French v. Cornwell*, 202 Neb. 569, 575, 276 N.W.2d 216, 220 (1979), we said: "'The primary purpose of the summary judgment statute is to pierce sham pleadings and to dispose of, without the necessity and expense and delay of trial, those cases where there is no genuine claim or defense. Properly used it can accomplish that purpose.'" And in *Watters v. Foreman*, 204 Neb. 670, 677, 284 N.W.2d 850, 854 (1979), we said: "Where there exists no genuine issue of a material fact and a litigant is entitled to judgment as a matter of law, it is error for the trial court to overrule the litigant's motion for summary judgment."

Based upon the pleadings and the affidavits of the parties as presented to us, we are unable to discern any genuine issue of fact and believe that Reeves is entitled to judgment as a matter of law. We therefore must conclude, as the trial court concluded, that Reeves was entitled to summary judgment. The trial court, therefore, was correct in affirming the municipal court's action granting the motion for summary judgment in favor of Reeves and against Watkins. The judgment is affirmed.

AFFIRMED.

RICHLING, District Judge, concurs in result.

STATE OF NEBRASKA, APPELLEE, V. WILLIE AMMONS, APPELLANT.

305 N.W.2d 812

Filed May 15, 1981. No. 43514.

1. **Criminal Trials: Witnesses.** Except in certain crimes such as sexual assault, a conviction may rest upon the testimony of a single eyewitness.
2. **Witnesses.** Generally, expert testimony is admissible only if it will be of assistance to the jury in its deliberations and relates to an area not within the competency of ordinary citizens.

Appeal from the District Court for Douglas County: PAUL J. HICKMAN, Judge. Affirmed.

Thomas M. Kenney, Douglas County Public Defender, and Stanley A. Krieger for appellant.

Paul L. Douglas, Attorney General, and Mel Kammerlohr for appellee.

Heard before KRIVOSHA, C.J., BOSLAUGH, MCCOWN, CLINTON, BRODKEY, WHITE, and HASTINGS, JJ.

BOSLAUGH, J.

The defendant appeals from a sentence to imprisonment for 16 2/3 to 50 years for robbery and a consecutive sentence of 5 to 10 years for use of a firearm to commit a felony. The assignments of error are that the evidence was insufficient to sustain the conviction; the trial court erred in failing to sustain the defendant's motion for a mistrial; in refusing to permit the defendant to introduce expert evidence as to the unreliability of eyewitness identification; and in refusing to grant immunity to a defense witness.

The evidence shows that on December 13, 1979, the defendant and an unidentified companion entered the Safeway store at 5755 Redick Avenue in Omaha, Nebraska, and at gunpoint took approximately $12,000 in cash from the safe and cash drawers in the office or check cashing booth in the store. The manager of

the store, who was forced to open the safe by the defendant, positively identified the defendant at the trial as the person who committed the robbery.

The defendant was arrested 6 days later. The officer who made the arrest was asked on direct examination if he had occasion to go to the City National Bank in Omaha on that day. The officer replied that the police had received information that a suspect wanted in regard to the robbery "was currently at the parole office up there." No objection or motion to strike was made at that time, but after the State had rested, the defendant moved for a mistrial because the witness had testified the defendant was arrested at the parole office. The defendant argues that this prevented him from having a fair trial because it implied that he had a criminal record.

The trial court felt that the evidence as to the place of arrest was harmless because there were a number of reasons why the defendant might be at the probation office and the statement of the witness did not necessarily imply that the defendant had been previously convicted of a crime. A motion for a mistrial is addressed to the sound discretion of the trial court, and its ruling will not be disturbed in the absence of a showing of an abuse of discretion. *Kenyon & Larsen v. Deyle*, 205 Neb. 209, 286 N.W.2d 759 (1980). The ruling was within the discretion of the trial court, and the failure to grant a mistrial was not an abuse of discretion.

The defendant contends the evidence was not sufficient to support the finding of guilty because the identification of the defendant as the robber was based upon the testimony of only one eyewitness to the crime. The defendant argues that corroborative evidence should be required where the identification of the person who committed the crime is based on the testimony of a single eyewitness.

It has long been the rule in this state that except in certain crimes such as sexual assault, a conviction may

rest upon the testimony of a single eyewitness. *Lee v. State*, 124 Neb. 165, 245 N.W. 445 (1932); *Schultz v. State*, 88 Neb. 613, 130 N.W. 105 (1911); *Cherpinsky v. State*, 122 Neb. 52, 238 N.W. 917 (1931); *Froding v. State*, 125 Neb. 322, 250 N.W. 91 (1933); *Small v. State*, 165 Neb. 381, 85 N.W.2d 712 (1957). See, also, *State v. Konvalin*, 179 Neb. 95, 136 N.W.2d 227 (1965); *Wilshusen v. State*, 149 Neb. 594, 31 N.W.2d 544 (1948); *State v. Cannon*, 185 Neb. 149, 174 N.W.2d 181 (1970); *Buckley v. State*, 79 Neb. 86, 112 N.W. 283 (1907). The eyewitness in this case, the manager of the store, had a good opportunity to view the defendant at close range while the robbery was being committed. There was ample foundation for his testimony and the evidence was sufficient to sustain a finding of guilty beyond a reasonable doubt.

The defendant produced a psychologist as an expert witness and offered his testimony to prove that eyewitness identification testimony tends to be inaccurate and unreliable. After an offer of proof had been made outside the presence of the jury, the trial court sustained a motion in limine made by the State and refused to admit the testimony. The trial court found that the prejudicial effect of the testimony outweighed its probative value; that the issue was not a proper subject for expert testimony; and that the evidence would usurp the function of the jury.

The general rule is that expert testimony is admissible only if it will be of assistance to the jury in its deliberations and relates to an area not within the competency of ordinary citizens. If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or determine a fact in issue, expert testimony may be admissible. Neb. Rev. Stat. § 27-702 (Reissue 1979). The expert testimony offered by the defendant in this case met none of those requirements. The accuracy or inaccuracy of eyewitness observation is a common experience of daily life. Such testimony would invade the province of the

jury. It is not surprising that almost no authority can be found to support the defendant's contention. The trial court did not err in sustaining the motion in limine.

The final assignment of error relates to the refusal of the trial court to grant immunity to Walter L. Goodwin, a witness tendered by the defense. According to defendant's counsel, if immunity had been granted, Goodwin would have testified that he had been a participant in the robbery and the defendant had not participated in the robbery.

Apparently, Goodwin was the otherwise unidentified companion of the defendant in the robbery. Goodwin was not prosecuted because evidence against him, which had been seized by the State, had been suppressed; and as a result of threats made to an identification witness, that witness refused to testify. Under the circumstances of this case, even if it be assumed that the trial court had the power to grant immunity to a defense witness, it was not error to refuse immunity to Goodwin in this case.

In *State v. McCown*, 189 Neb. 495, 203 N.W.2d 445 (1973), we recognized that immunity is an investigative tool that is solely a prerogative of the government. Its purpose is to permit the prosecution of offenses which could not otherwise be investigated or prosecuted.

It is generally held that immunity can be granted only pursuant to statutory authorization. See *United States v. Lenz*, 616 F.2d 960 (6th Cir. 1980). Under the Nebraska statute, Neb. Rev. Stat. § 29-2011.01 (Reissue 1979), the right to ask for immunity is conferred upon the prosecution only.

In *State v. Ammons*, *ante* p. 797, 305 N.W.2d 808 (1981), we noted that claims for defense witness immunity have been almost uniformly rejected by the courts.

There being no error, the judgment of the District Court is affirmed.

AFFIRMED.

McCOWN, J., concurs in result.

INDEX

Accreditation.

Where all the acts necessary to effect accreditation of a school district have been met prior to the statutory board ordering the transfer, and in fact the formal certification is granted prior to the time the children begin school and prior to the time the District Court acts on the appeal, the issue of the accreditation of the new district must be considered to have become moot and the transfer deemed to be permitted on the question of accreditation. Miller v. School Dist. No. 69 290

Administrative Agencies.

1. Enactment of the Environmental Protection Act does not divest district courts of subject matter jurisdiction to enjoin proposed solid waste disposal areas alleged to be in violation of county zoning ordinances. Omaha Fish and Wildlife Club, Inc. v. Community Refuse, Inc. 110
2. The Department of Environmental Control and county zoning officials are not indispensable parties in a suit against a licensee for a solid waste disposal area where the suit is to enjoin against an alleged violation of a county zoning ordinance. Omaha Fish and Wildlife Club, Inc. v. Community Refuse, Inc. 110
3. In proceedings to review an order of the State Real Estate Commission, the questions to be determined are whether the order of the Commission is supported by substantial evidence, whether the Commission acted within the scope of its authority, and whether its action was arbitrary, capricious, or unreasonable. Wright v. State ex rel. State Real Estate Comm. 467
4. The Nebraska Liquor Control Commisson has broad discretion in determining whether applications for licenses should be granted or denied and courts are without authority to interfere with that discretion unless it has been abused. City of Lincoln v. Nebraska Liquor Control Comm. 630
5. The courts, in reviewing decisions of the Nebraska Liquor Control Commission, do not exercise independent judgment on fact and policy, but must give due deference to the decisions made by the commission if the same are based upon evidence in the record. City of Lincoln v. Nebraska Liquor Control Comm. 630

Adoption.

1. Strict compliance with adoption statutes is required. Kellie v. Lutheran Family & Social Service 767
2. A duly executed revocation of a relinquishment and consent

to adoption delivered to a licensed child placement agency within a reasonable time after execution of the relinquishment and before the agency has, in writing, accepted full responsibility for the child, as required by statute, is effective to invalidate the original relinquishment and consent. Kellie v. Lutheran Family & Social Service 767
3. In the absence of threats, coercion, fraud, or duress, a properly executed relinquishment of parental rights and consent to adoption form signed by a natural parent knowingly, intelligently, and voluntarily is valid. Lum v. Mattley 789
4. A valid relinquishment terminates voluntarily the signer's parental rights, including the superior right to a fit and proper parent to custody of the child. Lum v. Mattley 789
5. A natural parent seeking to revoke a valid relinquishment has the burden of showing that the best interests of the child require revocation. Lum v. Mattley 789
6. The determination by the District Court in a habeas corpus case does not control the proper exercise of the jurisdiction of the county court in a later adoption proceeding. Lum v. Mattley 789

Adverse Possession.

1. A claim of title to land by adverse possession must be proved by actual, open, exclusive, and continuous possession under claim of ownership for a full period of 10 years.
   Nebraska State Bank v. Gaddis 136
   Weiss v. Meyer 429
2. Where one enters upon and takes possession of land of another under mistake as to the true boundary line, claiming the land as his own to a definite and certain boundary, he acquires title thereto by adverse possession by actual, open, exclusive, and continuous possession thereof under such claim for 10 years or more. Nebraska State Bank v. Gaddis 136
3. It is the visible and hostile possession, with an intention to possess land occupied under a belief that it belongs to the possessor, that constitutes its adverse character. Nebraska State Bank v. Gaddis 136
4. When a claimant occupies the land of another by actual, open, exclusive, and continuous possession, the owner is placed on notice that his ownership is endangered; and unless he takes proper action within 10 years to protect himself, he is barred from action thereafter and the title of the claimant is complete. It is the nature of the hostile possession that constitutes the warning, not the intent of the claimant when he takes possession. Nebraska State Bank v. Gaddis 136

5. In Nebraska the law is settled that the operation of the statute of limitations is to vest absolute title in the occupant, when he has maintained an actual, continued, notorious, and adverse possession under claim of ownership for the statutory period. Weiss v. Meyer 429
6. In determining the rights of an adverse owner, the entry and possession of his tenant, expressly authorized to act, is the entry and possession of such owner. Weiss v. Meyer 429
7. "Claim of ownership" as used in the law of adverse possession means nothing more than the intention of the occupant to appropriate and use the land as his own to the exclusion of all others, irrespective of any semblance or shadow of actual right or title. Weiss v. Meyer 429
8. Adverse possession is founded upon the intent with which an occupant held possession, and can best be determined by his acts. Weiss v. Meyer 429
9. The intent, even though mistaken, is sufficient as where the claimant occupies to the wrong line believing it to be the true line and even though he does not intend to claim more than that described in the deed. Weiss v. Meyer 429
10. The real purpose of prescribing the manner in which an adverse holding will be manifested is to give notice to the real owner that his title or ownership is in danger so that he may, within the period of limitation, take action to protect his interest. It is the nature of the hostile possession that constitutes the warning, not the intent of the claimant when he takes possession. Weiss v. Meyer 429
11. The law does not require that possession shall be evidenced by a complete enclosure, nor by persons remaining continuously upon the land and constantly from day to day performing acts of ownership thereon. It is sufficient if the land is used continuously for the purposes to which it may be in its nature adapted. In this respect, ordinarily the law does not undertake to specify the particular acts of occupation by which alone title by adverse possession may be acquired since the existence and establishment of the continuity must necessarily depend greatly on the circumstances of each case, and the use to which the property is adapted, the actual manner of its use, the circumstances of the occupant, and to some extent his intention must be considered. It is enough, however, that the land be devoted to the ordinary uses of the adverse claimant, provided the uses are such as to put the true proprietor on notice. Weiss v. Meyer 429
12. Land may be generally adapted to more than one use, and if the land is used for one or more of the major purposes for which it may in its nature be adapted, then that use will be

sufficient to establish continuity of possession, provided such use is sufficient to put the titleholder on notice. Weiss v. Meyer 429
13. Possession by permission of the owner will not ripen into title by adverse possession unless the change in the character of such possession has been brought home to the adverse party. Guynan v. Guynan 775

Affidavits.
1. Contempts may be prosecuted by affidavit, and such an affidavit serves the purpose of a pleading. State v. Wostoupal 555
2. Where the reading of an affidavit for contempt clearly indicates that the alleged violation of a court order was willful, the failure to use that express word does not render the affidavit defective. State v. Wostoupal 555

Aggravating and Mitigating Circumstances.
In order for something to be considered a mitigating factor it must be probative of any aspect of the defendant's character or record or any of the circumstances of the offense that could be proffered as a basis for a sentence less than death. State v. Rust 320

Alimony.
1. An unqualified allowance of alimony in gross made before July 6, 1972, whether payable immediately in full or periodically in installments, and whether intended solely as a property settlement or as an allowance for support, or both, is not subject to modification. Watley v. Watley 155
2. There is no mathematical formula by which awards for alimony or division of property in an action for dissolution of marriage can be precisely determined. They are to be determined by the facts of each case and the court will consider all pertinent facts in reaching an award that is just and equitable. Cole v. Cole 562
3. This court, on appeal, is not precluded from modifying an alimony award made by the District Court where such award is patently unfair on the record. An award of alimony may be altered on appeal where the record reflects good cause. Cole v. Cole 562
4. When dissolution of a marriage is decreed, the court may order payment of such alimony by one party to the other and division of property as may be reasonable, having regard for the circumstances of the parties. Cole v. Cole 562
5. It is the general rule in this state that allowances of alimony in the form of an annuity or requiring the husband to pay a fixed sum for an indefinite period of time are not favored. Cole v. Cole 562

Appeal and Error.

1. In an appeal to this court, the findings of fact made by the Workmen's Compensation Court shall have the same force and effect as a jury verdict in a civil case. Chrisman v. Greyhound Bus Lines, Inc. 6
2. In a trial to the court in a law action, the findings and judgment of the trial court on the facts have the same force as a jury verdict and will not be set aside if there is sufficient competent evidence to support them, and the findings of the court will not be disturbed on appeal unless clearly wrong.
   Koperski v. Husker Dodge, Inc. 29
   Aguallo v. Western Potato, Inc. 66
3. A motion for new trial on the ground of newly discovered evidence is addressed to the sound discretion of the trial court and, unless an abuse of discretion is shown, its determination will not be disturbed. State v. Record 90
4. We review a child custody order de novo, giving due regard to the trial court which observed the witnesses and their manner of testifying, and will not ordinarily disturb such order unless there is a clear abuse of discretion or it is clearly against the weight of the evidence.
   In re Interest of Goldfaden 93
   Ritchey v. Ritchey 100
   In re Interest of Goodon 256
   Meysenburg v. Meysenburg 456
   Soukup v. Soukup 672
5. The mentally disordered sex offender act, Neb. Rev. Stat. §§ 29-2911 to 29-2921 (Reissue 1979), does not authorize the courts of this state to review criminal proceedings unrelated to a defendant's status as a sex offender. State v. Irwin 123
6. In the absence of an abuse of discretion, a sentence imposed within statutory limits will not be disturbed on appeal.
   State v. Irwin 123
   State v. Wredt 184
7. For a question of constitutionality of a statute to be considered in this court, it must be properly raised in the trial court. If it is not raised in the trial court, it will be considered as waived in this court. State v. Irwin 123
8. The law requires this court in determining an appeal in an equity action involving questions of fact to reach an independent conclusion without reference to the findings of the District Court. In determining the weight of the evidence where there is an irreconcilable conflict on material issues of fact, this court will consider the fact that the trial court observed the witnesses and their manner of testifying.
   Nebraska State Bank v. Gaddis 136
   Weiss v. Meyer 429

9. The judgment of the trial court in an action at law where a jury has been waived has the effect of a verdict of a jury and will not be set aside unless clearly wrong. In determining the sufficiency of the evidence to sustain a judgment in a law action, it must be considered most favorably to the successful party, and every controverted fact must be resolved in that party's favor, and such party must have the benefit of any inferences reasonably deducible from it.
Rieschick Drilling Co. v. American Cas. Co. 142
Tibbs v. Fisher 306
10. Where a certain theory has been adopted and relied upon by the parties during the trial, such theory will be adhered to on appeal regardless of whether it is correct. Rieschick Drilling Co. v. American Cas. Co. 142
11. On appeal to this court, a case will be considered upon the theory upon which the case was tried below, even though not pleaded, where the parties have acquiesced in the theory and the case was submitted to the trial court on that basis. Rieschick Drilling Co. v. American Cas. Co. 142
12. An action for a permanent injunction is heard de novo on appeal. Where an action in equity is appealed, it is the duty of this court to try the issues de novo and to reach an independent conclusion without reference to the findings of the District Court. Daugherty v. Ashton Feed & Grain Co., Inc. 159
13. A defendant in a post conviction proceeding may not raise questions which could have been raised on direct appeal and which do not involve questions making the judgment of conviction void or voidable under the state or federal Constitutions. State v. Shepard 188
14. The verdict of the jury must be sustained if, taking the view most favorable to the State, there is sufficient evidence to support it. State v. Pena 250
15. Where a trial court judge sustains a motion for a new trial without specifying his reasons therefor, the appellant fulfills his burden by submitting the records to the Supreme Court and contending there is no prejudicial error. The burden shifts to the appellee to identify any prejudicial error in the record justifying a new trial. Belitz v. Suhr 280
16. The amount of attorney fees and the amount of referee fees rest in the sound judicial discretion of the trial court and will not be disturbed on appeal in the absence of an abuse of discretion. Sweet v. Fairbairn 286
17. The action of the statutory board under Neb. Rev. Stat. § 79-403 (Reissue 1976) is an exercise of quasi-judicial power, equitable in character, and upon appeal therefrom to the District Court the cause is triable de novo as though it had been originally instituted in such court, and upon appeal from the District Court to this court it is triable

de novo as in any other equitable action. Miller v. School Dist. No. 69 290
18. It is not the province of this court to resolve conflicts in the evidence, pass on the credibility of witnesses, determine the plausibility of explanations, or weigh evidence. Such matters are for the trier of fact, and the verdict must be sustained if, taking the view most favorable to the state, there is sufficient evidence to support it.
Tibbs v. Fisher 306
State v. Rust 320
19. The defendant has the burden of establishing a basis for relief in a post conviction proceeding and the findings of the District Court in denying such relief will not be disturbed on appeal unless they are clearly erroneous. State v. Rust 320
20. An appeal from the separate juvenile court involving termination of parental rights is determined de novo upon the record by this court.
In re Interest of Moen 337
In re Interest of Campbell 374
In re Interest of McKee 623
21. An error proceeding has for its purpose the removal of the record from an inferior to a superior tribunal to determine if the judgment or final order entered is in accordance with law. Hollingsworth v. Board of Education 350
22. In an appeal to the District Court from the action of the county board of equalization fixing the value of real property for tax purposes, the court shall affirm the action taken by the board unless evidence is adduced establishing that the action of the board was unreasonable or arbitrary, or unless evidence is adduced to establish that the property of the appellant is assessed too low. Bumgarner v. County of Valley 361
23. In an appeal to the county board of equalization or to the District Court, and from the District Court to this court, the burden of proof imposed on the complaining taxpayer is not met by showing a mere difference of opinion unless it is established by clear and convincing evidence that the valuation placed upon his property when compared with valuations placed on other similar property is grossly excessive and is the result of a systematic exercise of intentional will or failure of plain duty and not mere errors of judgment. Bumgarner v. County of Valley 361
24. A jury verdict will not be disturbed unless it is clearly erroneous and against the preponderance of the evidence. Krug v. Laughlin 367
25. In the absence of a judgment or order finally disposing of

a case, the Supreme Court has no authority nor jurisdiction to act, and in the absence of such judgment or order the appeal will be dismissed. Knoell Constr. Co., Inc. v. Hanson 373

26. An order overruling a motion for leave to amend pleadings is interlocutory and not appealable. Knoell Constr. Co., Inc. v. Hanson 373
27. A decision on the amount to be awarded as child support rests in the sound discretion of the trial court and will not be disturbed on appeal unless it appears that the court abused its discretion. Meysenburg v. Meysenburg 456
28. In proceedings to review an order of the State Real Estate Commission, the questions to be determined are whether the order of the Commission is supported by substantial evidence, whether the Commission acted within the scope of its authority, and whether its action was arbitrary, capricious, or unreasonable.
    Wright v. State ex rel. State Real Estate Comm. 467
    AFSCME Local 2088 v. County of Douglas 511
29. An appeal in a dissolution of marriage action is reviewed de novo by this court. Burnham v. Burnham 498
30. Attempting to arrive at comparables requires granting some discretion to the Commission of Industrial Relations; and unless there is no substantial evidence upon which the Commission of Industrial Relations could have concluded that the counties used by the Commission of Industrial Relations did, indeed, provide comparables, we may not as a matter of law disallow the action taken by the Commission of Industrial Relations. AFSCME Local 2088 v. County of Douglas 511
31. Questions not presented to or passed upon by the trial court will not be considered on appeal.
    Nielsen v. SID No. 229 542
    Guynan v. Guynan 775
32. Relief from the overassessment of property for tax purposes is by appeal to the District Court from the order of the county board of equalization fixing the assessed value of the property, and the remedy thus given is full, adequate, and exclusive. Jones v. Valley County Board of Equalization 559
33. The courts, in reviewing decisions of the Nebraska Liquor Control Commission, do not exercise independent judgment on fact and policy, but must give due deference to the decisions made by the commission if the same are based upon evidence in the record. City of Lincoln v. Nebraska Liquor Control Comm. 630
34. This court will not interfere with a conviction based on evidence unless it is so lacking in probative force that as a

matter of law it can be said that it is insufficient to support a verdict of guilt beyond a reasonable doubt. State v. Ohler 742
35. Where there is no bill of exceptions on appeal, this court is limited to a determination of whether the pleadings support the judgment of the trial court. Lum v. Mattley 789
36. In the absence of a bill of exceptions, the findings of the trial court with respect to the best interests of the child must be taken as correct. Lum v. Mattley 789
37. In an appeal from an order granting a motion for summary judgment, a motion for new trial is necessary in order for the court on appeal to review alleged errors in evidence. Kramer v. Swanson 794
38. When a motion for new trial is not filed in a law action, the court on appeal will examine the record only for the purpose of determining whether or not the judgment of the trial court is supported by the pleadings. Kramer v. Swanson 794

Arrests.

1. The test of probable cause for a warrantless arrest is whether at the moment the facts and circumstances within the officers' knowledge and of which they had reasonably trustworthy information were sufficient to warrant a prudent man in believing that the petitioner had committed or was committing an offense. State v. Jones 641
2. Knowledge on the part of law enforcement officers of previous law violations of a suspect is a factor to be considered in establishing probable cause for search or arrest for a similar crime. State v. Jones 641

Assault.

1. A dangerous instrument within the meaning of Neb. Rev. Stat. § 28-309 (Reissue 1979) is any instrumentality which, because of its nature and the manner and intention of its use, is capable of inflicting bodily injury, and need not be an instrument which is inherently dangerous and capable of inflicting injury. State v. Hatwan 450
2. The infliction of *serious* bodily injury is not a necessary element of assault in the second degree as defined by Neb. Rev. Stat. § 28-309(1)(a) (Reissue 1979). Neither is it an element of third degree assault under Neb. Rev. Stat. § 28-310 (Reissue 1979). State v. Hatwan 450
3. Where an accused is convicted of both second and third degree assault, it is not necessarily an abuse of discretion to impose a more severe sentence for the lesser assault than that imposed for the greater. State v. Hatwan 450

Attorney Fees.

1. The award of attorney fees and the taxing of costs are discretionary with the District Court.
   Ritchey v. Ritchey 100
   Rieschick Drilling Co. v. American Cas. Co. 142
2. In all cases where the beneficiary, or other person entitled thereto, brings an action upon any type of insurance policy except workmen's compensation insurance, or upon any certificate issued by a fraternal beneficiary association, against any company, person, or association doing business in this state, the court, upon rendering judgment against such company, person, or association, shall allow the plaintiff a reasonable sum as an attorney fee in addition to the amount of his recovery, to be taxed as part of the costs. Neb. Rev. Stat. § 44-359 (Reissue 1978). Rieschick Drilling Co. v. American Cas. Co. 142
3. If the shares confirmed by the judgment in partition and the existence of all encumbrances of which the plaintiff had actual or constructive notice were accurately pleaded in the original petition of the plaintiff, attorney fees shall be awarded entirely to the attorney for the plaintiff. This amount as well as a reasonable fee for the referee shall be taxed as costs in the proceedings. Sweet v. Fairbairn 286
4. Neb. Rev. Stat. § 48-646 (Reissue 1978) requires that the amount of attorney fees charged by a lawyer to his client be approved by the Commissioner of Labor. It does not authorize the District Court to award attorney fees for which approval by the commissioner has not been sought. School Dist. No. 20 v. Commissioner of Labor 663
5. The right to tax attorney fees is purely statutory in a workmen's compensation case. Savage v. Hensel Phelps Constr. Co. 676

Auctions.

An auction of real estate without reserve is within the statute of frauds. Neb. Rev. Stat. § 36-105 (Reissue 1978). Benson v. Ruggles & Burtch v. Benson 330

Bankruptcy.

1. Prior to October 1, 1979, before the 1978 Bankruptcy Act took effect, the bankruptcy court had summary jurisdiction over controversies with respect to property passing to the trustee under the act when the property was within the actual or constructive possession of the bankruptcy court or when the adverse claimant to the property consented to jurisdiction. Nicola v. Peters 439
2. The bankruptcy court could adjudicate title and right to possession of the crane in the turnover proceeding but in

that proceeding could not determine the amount due the trustee from the defendant under lease because the defendant did not consent to the summary jurisdiction of the bankruptcy court. Nicola v. Peters 439
3. Where an agreement has been fully performed by one party and the only performance due from the other is payment, the contract is no longer "executory" as that term is used in the Bankruptcy Act. Nicola v. Peters 439

Blood, Breath, and Urine Tests.
1. Under the Nebraska implied consent statutes a driver is not entitled to consult with a lawyer prior to taking a test, nor is the test required to be delayed by a request of an arrested motorist that he be permitted to contact a lawyer. Winter v. Peterson 785
2. A single request to submit to a test is sufficient. There is no requirement that a second request be made if the person arrested refuses to submit to the test. Winter v. Peterson 785
3. A conditional or qualified refusal to take a test to determine the alcohol content of body fluids under the implied consent law is not sanctioned by the act and such refusal is a refusal to submit to the test within the meaning of the act. Winter v. Peterson 785
4. A refusal to submit to a chemical test occurs within the meaning of the implied consent law when the licensee, after being asked to submit to a test, so conducts himself as to justify a reasonable person in the requesting officer's position in believing that the licensee understood that he was asked to submit to a test and manifested an unwillingness to take it. Winter v. Peterson 785
5. To constitute a refusal to submit to a chemical test required under the implied consent statute, the only understanding required by the licensee is an understanding that he has been asked to take a test. It is no defense to refusal that he does not understand the consequences of refusal or is not able to make a reasoned judgment as to what course of action to take. Winter v. Peterson 785

Board of Pardons.
Our holding in *Johnson & Cunningham v. Exon*, 199 Neb. 154, 256 N.W.2d 869 (1977), that approval of the Board of Pardons was required to apply L.B. 567 retroactively pertained only to those changes in the statute which would result in discharge from custody of the prisoner at an earlier date than before the amendments made by L.B. 567. Gochenour v. Bolin 444

Bonds.

1. The purpose of Neb. Rev. Stat. § 52-118 (Reissue 1978) is to secure payment to those furnishing labor, material, and equipment rental in the construction or repairing of any public building, structure, or improvement where the general provisions of the mechanic's lien laws do not apply. Dukane Corp. v. Sides Constr. Co. 227
2. Within the meaning of a payment bond which imposed the duty to pay for labor and materials "used or reasonably required for use in the performance of the contract," the phrase "reasonably required for use" was no more than a clause protecting the surety from excessive and unreasonable claims. Dukane Corp. v. Sides Constr. Co. 227

Brokers' Licenses.

1. Real estate licenses shall be granted only to persons who bear a good reputation of honesty, trustworthiness, integrity, and competence to transact the business of broker or salesman in such manner as to safeguard the interests of the public, and only after satisfactory proof of such qualifications has been presented to the commission. Neb. Rev. Stat. § 81-885.12 (Reissue 1976). Wright v. State ex rel. State Real Estate Comm. 467
2. The State Real Estate Commission may, upon its own motion, and shall, upon the sworn complaint in writing of any person, investigate the actions of any broker and shall have power to revoke or suspend any license or certificate issued under Neb. Rev. Stat. §§ 81-885.01 to 81-885.47 (Reissue 1976) whenever the license or certificate has been obtained by false or fraudulent representation or the licensee or certificate holder has been found guilty of the following unfair trade practice, i.e., demonstrating unworthiness or incompetency to act as a broker, associate broker, or salesman. Neb. Rev. Stat. § 81-885.24(28) (Reissue 1976). Wright v. State ex rel. State Real Estate Comm. 467
3. A real estate broker's license may be suspended or revoked for misconduct occurring in a real estate transaction whether the broker is acting for himself or others. Wright v. State ex rel. State Real Estate Comm. 467

Case Overruled.

1. An appeal from a judgment in an equitable action does not require the filing of a motion for new trial for a de novo review in this court of alleged errors in the findings and judgment of the trial court. To the extent that it conflicts herewith, *McClintock v. Nemaha Valley Schools*, 198 Neb. 477, 253 N.W.2d 304 (1977), is overruled. Petersen v. Petersen 1

2. In the absence of a motion to quash, an information which alleges an attempt to commit an act or acts which if successful would constitute a statutory crime sufficiently charges an attempted crime so as to withstand a jurisdictional attack made for the first time on appeal. To the extent that *Gandy v. The State*, 13 Neb. 445, 14 N.W. 143 (1882), is in conflict with this opinion, it is overruled. State v. Sodders 504

Child Custody.

1. In a paternity action where paternity has been admitted and the natural father has demonstrated a familial relationship with the child and has fulfilled parental responsibilities of support and maintenance, the fact that the child was born out of wedlock should be disregarded, and custody and visitation of minor children should be determined on the basis of the best interests of the children. In determining with which of the natural parents the children shall remain, the standards set out in Neb. Rev. Stat. § 42-364 (Reissue 1978) are to be applied. Cox v. Hendricks .. 23
2. The exclusive original jurisdiction given to the county court sitting as a juvenile court is not diminished by Neb. Rev. Stat. § 43-201 (Reissue 1978) where the child's custody is the subject of a preexisting District Court order issued pursuant to divorce proceedings. In re Interest of Goldfaden 93
3. The juvenile court can intervene between the parents and the child only if the child's condition requires the state to use its power to protect the welfare of the child. The circumstances of the child must come within the juvenile statutes. In re Interest of Goldfaden 93
4. We review a child custody order de novo, giving due regard to the trial court which observed the witnesses and their manner of testifying, and will not ordinarily disturb such order unless there is a clear abuse of discretion or it is clearly against the weight of the evidence.
   In re Interest of Goldfaden 93
   Ritchey v. Ritchey 100
5. Custody of minor children is to be determined by their best interests. In making this determination, the sexual misconduct of a parent is only one of several factors to be considered. Other factors are general considerations of the moral fitness of the parents; the emotional relationships between the children and their parents; and the age, sex, and health of the children. Ritchey v. Ritchey 100
6. While there may be no direct affirmative evidence of child abuse, where there is ample evidence of neglect and a lack of proper parental care directly and adversely in-

jurious to the health, safety, and well-being of the child, the best interests of the child become paramount. In re Interest of Kimsey 193
7. Above all other considerations in determining the question of who should have custody of a minor child upon the dissolution of a marriage, the paramount consideration is the best interests and welfare of the child. Meysenburg v. Meysenburg 456
8. Where the issue of child custody is involved, both the mother and the father have an equal right to the custody of their children. The test for determining custody is the best interests of the child. Burnham v. Burnham 498
9. In determining which parent shall be awarded custody of the children, the court shall not give preference to either parent based on the sex of the parent. Burnham v. Burnham 498
10. Although the courts should preserve an attitude of impartiality between religions and will not disqualify a parent solely because of his or her religious beliefs, we do have a duty to consider whether such beliefs threaten the health and well-being of a child. Burnham v. Burnham 498
11. In determining the best interests of a child in awarding custody, the court must consider myriad factors in working toward this goal, and to hold that it may not consider religious factors under any circumstances would blind courts to important elements bearing on the best interests of the child. Burnham v. Burnham 498
12. In determining the question of custody of a child, it is proper for a court to examine the impact of the parent's beliefs on the child. Burnham v. Burnham 498
13. The determination of the trial court with respect to changing the custody of minor children will not ordinarily be disturbed unless there is a clear abuse of discretion or it is clearly against the weight of the evidence. Soukup v. Soukup 672

Child Support.

1. A decision on the amount to be awarded as child support rests in the sound discretion of the trial court and will not be disturbed on appeal unless it appears that the court abused its discretion. Meysenburg v. Meysenburg 456
2. Accrued child support payments are not subject to modification. Conrad v. Conrad 588
3. Remarriage of mother before decree of dissolution became final and her removal of child from the jurisdiction without consent of the court held not to estop mother from collecting accrued child support payments. Conrad v. Conrad 588
4. A decree fixing child support payments is not subject to

modification in the absence of a material change in circumstances occurring subsequent to the entry of the decree requiring modifications in the best interests of the children. Soukup v. Soukup 672
5. In determining whether a modification of child support is warranted, the circumstances of the parents as well as those of the children must be considered. Soukup v. Soukup 672

Circumstantial Evidence.
Ordinarily, in a case charging first degree murder, where there is no eyewitness to the act, and the evidence is largely circumstantial, the jury should be instructed as to the law governing murder in the first degree, second degree, and manslaughter. State v. Ellis 379

Collateral Attack.
1. As a general rule, domestic judgments cannot be collaterally attacked or impeached by the parties for fraud or collusion not going to the jurisdiction, and consent judgments are as conclusive on collateral attack as judgments rendered after trial. Nielsen v. SID No. 229 542
2. A collateral attack may be made upon an assessment of property for tax purposes only if the assessment or some part thereof is wholly void. Jones v. Valley County Board of Equalization 559

Collateral Estoppel.
Collateral estoppel may be applied if the identical issue was decided in a prior action, there was a judgment on the merits which was final, the party against whom the rule is to be applied was a party or in privity with the party to the prior action, and there was an opportunity to fully and fairly litigate the issue in the prior action. Reeves v. Watkins 804

Commission of Industrial Relations.
1. The standard of review by the Supreme Court of orders and decisions of the Commission of Industrial Relations is generally restricted to considering whether the Commission of Industrial Relations order is supported by substantial evidence, whether the Commission of Industrial Relations acted within the scope of its statutory authority, and whether its action was arbitrary, capricious, or unreasonable. AFSCME Local 2088 v. County of Douglas 511
2. Determinations made by the Commission of Industrial Relations in accepting or rejecting claimed comparables are within the field of expertise of the Commission of Industrial

Relations and should be given due deference. AFSCME Local 2088 v. County of Douglas 511
3. Factors most often used to determine comparability are geographic proximity, population, job descriptions, job skills, and job conditions. AFSCME Local 2088 v. County of Douglas 511
4. Attempting to arrive at comparables requires granting some discretion to the Commission of Industrial Relations; and unless there is no substantial evidence upon which the Commission of Industrial Relations could have concluded that the counties used by the Commission of Industrial Relations did, indeed, provide comparables, we may not as a matter of law disallow the action taken by the Commission of Industrial Relations. AFSCME Local 2088 v. County of Douglas 511
5. Where there are local comparisons which can or should be made, they may not be disregarded if in fact it appears from the evidence that the local employers are comparable in that they meet the requirements of Neb. Rev. Stat. § 48-818 (Reissue 1978). AFSCME Local 2088 v. County of Douglas 511
6. Whenever there is another employer in the same market hiring employees to perform same or similar skills, the salaries paid to those employees must be considered by the Commission of Industrial Relations unless evidence establishes that there are substantial differences which cause the work or conditions of employment to be dissimilar. AFSCME Local 2088 v. County of Douglas 511
7. No public employer shall withhold pay raises otherwise determined to be granted to public employees in a given year solely on the basis that they are then engaged in a labor dispute over a previous year's wages. AFSCME Local 2088 v. County of Douglas 511
8. The Commission of Industrial Relations' authority to resolve disputes concerning terms, tenure, or conditions of employment is limited to situations in which the parties have not yet reached agreement. Once an agreement is reached and a subsequent breach is alleged to have occurred, the parties are required to litigate their dispute in a competent court having jurisdiction of the matter. Saltz v. School Dist. of Norfolk 740

Comprehensive Development Plans.

A comprehensive development plan as defined in Neb. Rev. Stat. § 19-903 (Reissue 1977) includes: (1) A land-use element which designates the proposed general distributions, general location, and extent of the uses of land for agriculture, housing, commerce, industry, recreation, education, public buildings and lands, and other categories

of public and private use of land; (2) The general location, character, and extent of existing and proposed major roads, streets, and highways, and air and other transportation routes and facilities; and (3) The general location, type, capacity, and area served of present and projected or needed community facilities including recreation facilities, schools, libraries, other public buildings, and public utilities and services. Village of McGrew v. Steidley 726

Confessions.

To be admissible in evidence a confession must be free and voluntary and must not have been extracted by any sort of threat or violence, nor may it have been obtained by any direct or implied promises, however slight, nor by the exertion of any improper influence. State v. Jones 641

Conflict of Interest.

1. Unless the trial court knows or reasonably should know that a particular conflict of interest between defendants represented by the same counsel in a criminal trial exists, the court need not initiate an inquiry. State v. Hudson and Maeberry 649
2. Without special circumstances which would create a duty of inquiry, a defendant who raised no objection at trial must demonstrate that an actual conflict of interest adversely affected his lawyer's performance in order to gain reversal of a conviction. State v. Hudson and Maeberry 649
3. Where the trial court recognizes a divergence between the respective roles played by defendants in an alleged crime, special circumstances then exist which require a voluntary inquiry by the court into a possible conflict of defendants' interests. State v. Hudson and Maeberry 649
4. Where a potential conflict in interest arises, the proper course of action for the trial judge is to conduct a hearing to determine whether a conflict exists to the degree that a defendant may be prevented from receiving advice and assistance sufficient to afford him the quality of representation guaranteed by the sixth amendment. State v. Hudson and Maeberry 649

Consideration.

Under the Uniform Commercial Code, no consideration is necessary for an instrument given as security for a debt already owed by the party giving it or by a third person. Newman Grove Creamery Co. v. Deaver 178

Constitutional Law.

1. Where a defendant in a civil case refuses to testify on the

ground that the evidence may incriminate him, the trier of fact may draw an adverse inference from his refusal. State ex rel. Schuler v. Dunbar 69
2. For a question of constitutionality of a statute to be considered in this court, it must be properly raised in the trial court. If it is not raised in the trial court, it will be considered as waived in this court. State v. Irwin 123
3. A person may attack the constitutionality of a statute only when and so far as it is being or is about to be applied to his disadvantage; and to raise the question he must show that the alleged unconstitutional feature of the statute injures him and so operates as to deprive him of a constitutional right. A party to a suit will not ordinarily be permitted to attack the constitutionality of a statute in a case where his rights and interests are not invaded or affected by its provisions. State v. Irwin 123
4. The Nebraska death penalty statutes, Neb. Rev. Stat. §§ 29-2519 to 29-2546 (Reissue 1979), do not violate the provisions of the U.S. or Nebraska Constitutions. State v. Harper 568
5. In order for the commerce clause of the U.S. Constitution to apply to state regulation of a commodity, that commodity must be an article of commerce. State ex rel. Douglas v. Sporhase 703
6. The Nebraska Constitution declares water for irrigation purposes in the State of Nebraska to be a natural want. State ex rel. Douglas v. Sporhase 703
7. Since ground water in Nebraska is not an article of commerce, the commerce clause of the U.S. Constitution does not apply to Neb. Rev. Stat. § 46-613.01 (Reissue 1978). State ex rel. Douglas v. Sporhase 703
8. Neb. Rev. Stat. § 46-613.01 (Reissue 1978) does not deprive affected persons of liberty or property without due process of law. State ex rel. Douglas v. Sporhase 703
9. The capacity of a person to claim the protection of the fourth amendment depends not upon a property right in the invaded place, but upon whether the person who claims the protection of the amendment has a legitimate expectation of privacy in the invaded place. State v. Ohler 742
10. Neb. Rev. Stat. § 43-209(6) (Reissue 1978) is sufficiently definite and is not unconstitutionally vague. In re Interest of Witherspoon 755

Contempt.

1. Contempts may be prosecuted by affidavit, and such an affidavit serves the purpose of a pleading. State v. Wostoupal 555
2. Where the reading of an affidavit for contempt clearly indicates that the alleged violation of a court order was

willful, the failure to use that express word does not render the affidavit defective. State v. Wostoupal 555
3. The voluntary entry of a plea of guilty to a charge of contempt waives formal defects in the information, affidavit, or accusation. State v. Wostoupal 555

Contractors and Subcontractors.

1. Any person having direct contractual relationship with a subcontractor but no contractual relationship, express or implied, with the contractor furnishing such bond shall have a right of action upon the bond upon giving written notice to the contractor within 4 months from the date on which such person did or performed the last of the labor, or furnished or supplied the last of the material for which such claim is made, stating with substantial accuracy the amount claimed and the name of the party to whom the material was furnished or supplied or for whom the labor was done or performed. Neb. Rev. Stat. § 52-118.01 (Reissue 1978). Rieschick Drilling Co. v. American Cas. Co. 142
2. There being no specific standard by which reasonable value of labor and materials furnished shall be proved, prima facie proof thereof is made where a reasonable inference of such value flows from the evidence adduced. Rieschick Drilling Co. v. American Cas. Co. 142
3. The purpose of Neb. Rev. Stat. § 52-118 (Reissue 1978) is to secure payment to those furnishing labor, material, and equipment rental in the construction or repairing of any public building, structure, or improvement where the general provisions of the mechanic's lien laws do not apply. Dukane Corp. v. Sides Constr. Co. 227
4. Where the general mechanic's lien laws are applicable the lien of a materialman for materials furnished for the erection of a building by virtue of an agreement with the contractor extends to such materials only as are used in or delivered at the building for use therein. Dukane Corp. v. Sides Constr. Co. 227
5. With certain exceptions, the employer of an independent contractor is not liable for physical harm caused to another by the acts or omissions of the contractor or his servants. Sullivan v. Geo. A. Hormel and Co. 262
6. The term "independent contractor" includes building contractors erecting a building for a fixed sum according to specifications and not subject to the owner's control over the method of accomplishment. Sullivan v. Geo. A. Hormel and Co. 262
7. An employer of an independent contractor may, without changing the status of the parties, exercise such control as is necessary to assure performance of the contract in

accordance with its terms. Sullivan v. Geo. A. Hormel and Co. 262
8. The general contractor, in control of the premises where work performance under a contract with the owner is being carried out, owes a duty to persons rightfully on the premises to keep the premises in a reasonably safe condition while the contract is in the course of performance. Sullivan v. Geo. A. Hormel and Co. 262
9. Under the terms of the construction contract here involved, including the general conditions contained in AIA document A201, April 1970 edition, especially the provisions relating to initiating, maintaining, and supervising all safety precautions and programs in connection with the work, including those with reference to safety and cleanup, the relationship of owner and independent contractor was not converted to that of master and servant. Sullivan v. Geo. A. Hormel and Co. 262

Contracts.

1. In construing a contract, the instrument must be read as a whole, giving force and effect to all its provisions to determine whether or not any ambiguity exists and whether, if such ambiguity does exist, the contract is confusing and uncertain in its terms. Lavalleur v. State Automobile & Cas. Underwriters 82
2. Any person having direct contractual relationship with a subcontractor but no contractual relationship, express or implied, with the contractor furnishing such bond shall have a right of action upon the bond upon giving written notice to the contractor within 4 months from the date on which such person did or performed the last of the labor, or furnished or supplied the last of the material for which such claim is made, stating with substantial accuracy the amount claimed and the name of the party to whom the material was furnished or supplied or for whom the labor was done or performed. Neb. Rev. Stat. § 52-118.01 (Reissue 1978). Rieschick Drilling Co. v. American Cas. Co. 142
3. In all cases where the beneficiary, or other person entitled thereto, brings an action upon any type of insurance policy except workmen's compensation insurance, or upon any certificate issued by a fraternal beneficiary association, against any company, person, or association doing business in this state, the court, upon rendering judgment against such company, person, or association, shall allow the plaintiff a reasonable sum as an attorney fee in addition to the amount of his recovery, to be taxed as part of the costs. Neb. Rev. Stat. § 44-359 (Reissue 1978). Rieschick Drilling Co. v. American Cas. Co. 142

4. An employer of an independent contractor may, without changing the status of the parties, exercise such control as is necessary to assure performance of the contract in accordance with its terms. Sullivan v. Geo. A. Hormel and Co. 262
5. Under the terms of the construction contract here involved, including the general conditions contained in AIA document A201, April 1970 edition, especially the provisions relating to initiating, maintaining, and supervising all safety precautions and programs in connection with the work, including those with reference to safety and cleanup, the relationship of owner and independent contractor was not converted to that of master and servant. Sullivan v. Geo. A. Hormel and Co. 262
6. Probationary teachers in Class I, II, III, and VI schools are not entitled to notice of conditions constituting just cause for termination because their contracts are not continuing and no cause need be shown to terminate them. Meyer v. Board of Education 302
7. Generally, a party who has failed or refused to perform the terms and conditions imposed upon him by a contract, or has not been ready, willing, and able to perform the same, cannot recover for a breach thereof by the other party. Tibbs v. Fisher 306
8. There is implied in every contract for work or services a duty to perform it skillfully, carefully, diligently, and in a workmanlike manner. Tibbs v. Fisher 306
9. Substantial performance is shown in a building contract when all of the essentials necessary to the full accomplishment of the purposes for which the thing contracted for has been constructed and performed with such an approximation to complete performance that the owner obtains substantially what is called for by the contract. Tibbs v. Fisher 306
10. A guarantor is entitled to be subrogated to the benefit of all the security and means of payment under the creditor's control, and, in the absence of assent, waiver, or estoppel, the guarantor is generally released by an act of the creditor which deprives the guarantor of such right. Southwest Bank of Omaha v. Herting 347
11. The promise in a land sales contract for the seller to convey real estate is consideration for the promise of the buyer to purchase the real estate. Litz v. Wilson 483
12. Where a land sales contract is executory and the vendee makes default, the remedies of the vendor are to rescind, specific performance, foreclosure of the contract as a mortgage, or bring suit for damages for the breach. Litz v. Wilson 483

13. As a general rule, where a valid contract exists, which is definite and certain in its terms, mutual in obligation, and free from unfairness, fraud, or overreaching, a court will grant a decree of specific performance where the remedy at law is inadequate and specific performance will not be inequitable or unjust. Litz v. Wilson 483
14. A court of equity will refuse to enforce a contract when it is not clearly satisfied that it embodies the real understanding of the parties. Litz v. Wilson 483
15. A subsequent contract which does not completely cover the same subject matter of a prior agreement and does not contain terms inconsistent with the former contract so that the two cannot stand together does not supersede or substitute for the earlier contract and become the only agreement of the parties. Hagerbaumer v. Hagerbaumer Brothers, Inc. 613
16. A contract complete in itself will be conclusively presumed to supersede and discharge another one made prior thereto between the same parties concerning the same subject matter, where the terms of the latter are inconsistent with those of the former so that they cannot subsist together. Hagerbaumer v. Hagerbaumer Brothers, Inc. 613
17. Under the provisions of Neb. Rev. Stat. §§ 25-701 and 25-702 (Reissue 1979), the joinder in a single action of the cause against the uninsured motorist with the insurer carrying the uninsured motorist coverage for the claimant is not permissible. Eich v. State Farm Mut. Automobile Ins. Co. 714
18. In a suit against the uninsured motorist, the amount of uninsured motorist coverage should not be disclosed to the jury. Eich v. State Farm Mut. Automobile Ins. Co. . 714
19. The following exclusion in uninsured motorist coverage does not prevent the stacking of coverage where the insured has separate policies of uninsured motorist coverage on two or more vehicles: "(b) TO *BODILY INJURY* TO AN *INSURED* WHILE *OCCUPYING* OR THROUGH BEING STRUCK BY A LAND MOTOR VEHICLE OWNED BY THE NAMED INSURED OR ANY *RESIDENT* OF THE SAME HOUSEHOLD, IF SUCH VEHICLE IS NOT AN *OWNED MOTOR VEHICLE*," and the policy definition of owned motor vehicle includes the motor vehicle described in the declaration. Eich v. State Farm Mut. Automobile Ins. Co. 714

Costs.

The award of attorney fees and the taxing of costs are discretionary with the District Court. Ritchey v. Ritchey 100

Courts.

1. The mentally disordered sex offender act, Neb. Rev. Stat. §§ 29-2911 to 29-2921 (Reissue 1979), does not authorize the courts of this state to review criminal proceedings unrelated to a defendant's status as a sex offender. State v. Irwin 123
2. The action of the statutory board under Neb. Rev. Stat. § 79-403 (Reissue 1976) is an exercise of quasi-judicial power, equitable in character, and upon appeal therefrom to the District Court the cause is triable de novo as though it had been originally instituted in such court, and upon appeal from the District Court to this court it is triable de novo as in any other equitable action. Miller v. School Dist. No. 69 290
3. The purpose of an order nunc pro tunc is to correct the record so that it will truly reflect action actually taken, but which through inadvertence or mistake has not been truly recorded. State v. Al-Hafeez 681
4. The limited remedy available in an application for an order nunc pro tunc will not be extended to question the constitutionality of the actions taken or declined to be taken by the trial court, but is limited to the specific purpose of the proceeding, that is, to correct the record to accurately reflect what actually happened in the proceedings. State v. Al-Hafeez 681
5. The determination by the District Court in a habeas corpus case does not control the proper exercise of the jurisdiction of the county court in a later adoption proceeding. Lum v. Mattley 789

Criminal Attempt.

1. In order to constitute an attempt to commit a crime under Neb. Rev. Stat. § 28-201 (Reissue 1979), there must be an intentional act on the part of the defendant which would constitute a substantial step toward the completion of the allegedly attempted crime, assuming that the circumstances at the time were as the defendant believed them to be. State v. Sodders 504
2. The determination of whether the defendant's conduct constituted a substantial step toward the completion of the crime is a question of fact. State v. Sodders 504
3. In the absence of a motion to quash, an information which alleges an attempt to commit an act or acts which if successful would constitute a statutory crime sufficiently charges an attempted crime so as to withstand a jurisdictional attack made for the first time on appeal. To the extent that *Gandy v. The State*, 13 Neb. 445, 14 N.W. 143 (1882), is in

conflict with this opinion, it is overruled.
State v. Sodders 504
State v. Meredith 637

Criminal Defendants.

1. Just as an accused has the right to confront the prosecution's witnesses for the purpose of challenging their testimony, he has the right to present his own witnesses to establish a defense. This right is a fundamental element of due process of law. State v. Ammons 797
2. The constitutional right of a defendant to call witnesses in his defense mandates that they must be called without intimidation. State v. Ammons 797

Criminal Law.

1. The standard for determining whether defense counsel has rendered constitutionally required effective assistance is whether counsel has performed at least as well as a lawyer with ordinary training and skill in the criminal law in that area and has conscientiously protected the interests of his client.
   State v. Shepard 188
   State v. Rust 320
2. In order for one to maintain ineffective counsel the record must affirmatively support the claim.
   State v. Shepard 188
   State v. Pankey 377
3. In determining the sufficiency of the evidence to sustain a conviction in a criminal prosecution, it is not the province of this court to resolve conflicts in the evidence, pass upon the credibility of witnesses, determine the plausibility of explanations, or weigh the evidence, as such matters are for the jury.
   State v. Pena 250
   State v. Rust 320
4. Evidence of a defendant's fingerprints has probative value; and it is for the jury to determine, in light of all other evidence, whether such evidence permits an inference to be drawn that beyond a reasonable doubt defendant was the person who committed the offense in question. State v. Pena 250
5. The amendment of a statute under which an accused was convicted does not affect the legitimacy of his conviction or the propriety of his sentence. State v. Rust 320
6. The determination of sufficiency of counsel must be made within the context of the facts of a particular case, and we

will not require defense counsel to develop ridiculous trial tactics because they are suggested by the defendant. State v. Rust 320
7. In order for something to be considered a mitigating factor it must be probative of any aspect of the defendant's character or record or any of the circumstances of the offense that could be proffered as a basis for a sentence less than death. State v. Rust 320
8. Error or prejudice allegedly resulting from the ineffective assistance of counsel cannot be established where witnesses were not called, absent a showing in the record of the beneficial nature of such witnesses' testimony. State v. Pankey 377
9. The "other-crimes" rule, Neb. Rev. Stat. § 27-404(2) (Reissue 1979), is a rule of relevance and such evidence is ordinarily prejudicial because prior criminal activity is irrelevant to the proof of a specific crime. State v. Ellis 379
10. It is competent for the prosecution to put in evidence all relevant facts and circumstances which tend to establish any of the constituent elements of the crime with which the accused is charged, even though such facts and circumstances may prove or tend to prove that the defendant committed other crimes. State v. Ellis 379
11. A not guilty plea places in issue every relevant fact, and the prosecution should not be precluded from introducing evidence on a certain element of the alleged crime because there was already some other evidence in the case tending to establish the same, until and unless the trial court, in the exercise of its discretion, determines that further evidence on that point is irrelevant. State v. Ellis 379
12. A purported showing of a paucity of evidence does not prove that a trial court abused its discretion in balancing the probative value against the prejudicial effect of a particular item of disputed evidence. In fact, a lack of other relevant evidence may in some instances increase the probative value of the evidence available. State v. Ellis 379
13. The admissibility of evidence of other crimes lies largely within the discretion of the trial court. State v. Ellis 379
14. Evidence of other crimes, if relevant to the issue, is not made inadmissible simply because they occurred at a time after that of the principal charge. State v. Ellis 379
15. In order to comport with due process of law, a criminal statute must be reasonably clear and definite. State v. Sodders 504
16. A defendant has no standing to challenge as vague a portion of the language of a statute which does not apply to his conduct when an unambiguous section of the statute clearly applies to such conduct.

State v. Sodders 504
State v. Meredith 637
17. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. State v. Harper 568
18. A sentencing judge has broad discretion as to the source and type of evidence or information which may be used as assistance in determining the kind and extent of the punishment to be imposed, and the judge may consider probation officer reports, police reports, affidavits, and other information, including his own personal observations. State v. Stranghoener 598
19. A sentencing judge is not bound by the recommendations of the probation officer in determining the sentence to be imposed. State v. Stranghoener 598
20. Among the factors meriting consideration when sentence is imposed are the family ties, age, mentality, education, experience, and social and cultural background of the convicted criminal; his willingness to work at honest labor; his past criminal record or law-abiding conduct; the motivation for the offense, the nature of the offense, and the amount of violence, if any, involved in the commission of the offense. State v. Stranghoener 598

Criminal Trials.

1. Unless the trial court knows or reasonably should know that a particular conflict of interest between defendants represented by the same counsel in a criminal trial exists, the court need not initiate an inquiry. State v. Hudson and Maeberry 649
2. Without special circumstances which would create a duty of inquiry, a defendant who raised no objection at trial must demonstrate that an actual conflict of interest adversely affected his lawyer's performance in order to gain reversal of a conviction. State v. Hudson and Maeberry 649
3. Where the trial court recognizes a divergence between the respective roles played by defendants in an alleged crime, special circumstances then exist which require a voluntary inquiry by the court into a possible conflict of defendants' interests. State v. Hudson and Maeberry 649
4. Where a potential conflict in interest arises, the proper course of action for the trial judge is to conduct a hearing to determine whether a conflict exists to the degree that a defendant may be prevented from receiving advice and assistance sufficient to afford him the quality of representa-

tion guaranteed by the sixth amendment. State v. Hudson and Maeberry 649
5. Except in certain crimes such as sexual assault, a conviction may rest upon the testimony of a single eyewitness. State v. Ammons 812

Crops.

In general, the word "crops" means all products of the soil that are grown and raised annually and gathered in a single season. O'Neill Production Credit Assn. v. Schnoor .. 105

Damages.

1. If an actor's conduct is negligent as creating an unreasonable risk of causing either bodily harm or emotional disturbance to another and it results in such emotional disturbance alone without bodily harm or other compensable damage, the actor is not liable for such emotional disturbance. Fournell v. Usher Pest Control Co. 684
2. Under the circumstances here, conduct involving the failure of the defendant to discover termite damage to plaintiffs' house did not create an unreasonable risk of causing bodily harm as a matter of law. Fournell v. Usher Pest Control Co. 684

Death Penalty.

1. The Nebraska death penalty statutes, Neb. Rev. Stat. §§ 29-2519 to 29-2546 (Reissue 1979), do not violate the provisions of the U.S. or Nebraska Constitutions. State v. Harper 568
2. In the context of Neb. Rev. Stat. Ch. 29, art. 25 (Reissue 1979), the word "sentence" in § 29-2521.03 is construed to mean a sentence of death, and the provisions of that section directing the determination by the Supreme Court of the propriety of a "sentence" by comparison with previous cases are applicable only in a case where a sentence of death has been imposed. State v. Harper 568
3. Where a death sentence has been imposed and the Supreme Court is required to determine the propriety of that sentence in such case, the determination of which previous first degree murder cases involve the same or similar circumstances and are therefore comparable will be made by this court on a case-by-case basis. State v. Harper 568

Decedents' Estates.

1. When one claims an estate of a deceased person under an alleged oral contract, the evidence of such agreement must be clear, satisfactory, and unequivocal. Guynan v. Guynan 775

2. Neb. Rev. Stat. § 36-103 (Reissue 1978) shall not be construed to affect in any manner the power of a testator in the disposition of his real estate by a last will and testament, nor to prevent any trust from arising or being extinguished by implication or operation of law. Neb. Rev. Stat. § 36-104 (Reissue 1978). Guynan v. Guynan 775

Declaratory Judgments.

A declaratory judgment action is not an appropriate remedy to attack an assessment of real property made by the county board of equalization. Jones v. Valley County Board of Equalization 559

Defense Counsel.

1. Unless the trial court knows or reasonably should know that a particular conflict of interest between defendants represented by the same counsel in a criminal trial exists, the court need not initiate an inquiry. State v. Hudson and Maeberry 649
2. Without special circumstances which would create a duty of inquiry, a defendant who raised no objection at trial must demonstrate that an actual conflict of interest adversely affected his lawyer's performance in order to gain reversal of a conviction. State v. Hudson and Maeberry 649
3. Where the trial court recognizes a divergence between the respective roles played by defendants in an alleged crime, special circumstances then exist which require a voluntary inquiry by the court into a possible conflict of defendants' interests. State v. Hudson and Maeberry 649
4. Where a potential conflict in interest arises, the proper course of action for the trial judge is to conduct a hearing to determine whether a conflict exists to the degree that a defendant may be prevented from receiving advice and assistance sufficient to afford him the quality of representation guaranteed by the sixth amendment. State v. Hudson and Maeberry 649

Delayed Sentences.

1. Upon a delayed sentencing for a sexual offense, credit must be given for time spent in confinement under a commitment as a sexual sociopath based on the same sexual offense. State v. Moore 240
2. Where delayed consecutive sentences for sexual offenses are pronounced, credit for time served under a prior sexual sociopath commitment based on the same sexual offenses is to be applied to the first sexual sentence to be served. Only excess credit, if any, is to be applied to any consecutive sexual sentence to be served later. Credit

shall not be applied on any sentence until the defendant commences to serve the sentence. State v. Moore 240

Demurrer.

1. A demurrer ore tenus is a permissible practice; and if a pleading to which it is addressed is totally defective, it is error to admit any evidence under such pleading. Newman Grove Creamery Co. v. Deaver 178
2. Generally, it constitutes an abuse of discretion to sustain a demurrer without leave to amend where there is a reasonable possibility that the defect can be cured by amendment. Newman Grove Creamery Co. v. Deaver 178

Derivative Actions.

In a derivative action by a taxpayer on behalf of a sanitary and improvement district the taxpayer has no rights greater than the rights the district itself possesses. Nielsen v. SID No. 229 542

Directed Verdict.

1. The party against whom a verdict is directed is entitled to have every controverted fact resolved in his favor and to have the benefit of every inference that can reasonably be deduced from the evidence. It is only when the facts are conceded, undisputed, or are such that reasonable minds can draw but one conclusion therefrom that the trial court must decide the question as a matter of law and not submit it to a jury.
   Simet v. Sage 13
   Esbenshade v. National Life Ins. Co. 216
   Krug v. Laughlin 367
2. It is a well-established rule that if there is any evidence which will sustain a finding for the litigant having the burden of proof in a cause, the trial court may not disregard it and decide the case as a matter of law. Esbenshade v. National Life Ins. Co. 216
3. To test the evidence for a jury question, the trial court must resolve every controverted fact in favor of the party against whom a verdict is sought and give that party the benefit of every inference which can reasonably be drawn from the evidence presented. Krug v. Laughlin 367
4. In all actions brought to recover damages for injuries to a person or his property, all questions of negligence and contributory negligence shall be for the jury. Neb. Rev. Stat. § 25-1151 (Reissue 1979). Krug v. Laughlin 367

Divorce.

1. Above all other considerations in determining the question

of who should have custody of a minor child upon the dissolution of a marriage, the paramount consideration is the best interests and welfare of the child. Meysenburg v. Meysenburg 456
2. We review the record de novo, giving due regard to the trial court which had the opportunity to observe the witnesses.
Meysenburg v. Meysenburg 456
Burnham v. Burnham 498
3. There is no mathematical formula by which awards for alimony or division of property in an action for dissolution of marriage can be precisely determined. They are to be determined by the facts of each case and the court will consider all pertinent facts in reaching an award that is just and equitable. Cole v. Cole 562
4. This court, on appeal, is not precluded from modifying an alimony award made by the District Court where such award is patently unfair on the record. An award of alimony may be altered on appeal where the record reflects good cause. Cole v. Cole 562
5. When dissolution of a marriage is decreed, the court may order payment of such alimony by one party to the other and division of property as may be reasonable, having regard for the circumstances of the parties. Cole v. Cole 562
6. It is the general rule in this state that allowances of alimony in the form of an annuity or requiring the husband to pay a fixed sum for an indefinite period of time are not favored. Cole v. Cole 562

Double Jeopardy.

The granting of a new trial because of errors occurring at the original trial does not necessarily constitute double jeopardy. Addison v. Parratt 459

Due Process.

In order to comport with due process of law, a criminal statute must be reasonably clear and definite. State v. Sodders 504

Easements.

1. Where an easement such as a right-of-way is granted without fixing its exact location, the location may be subsequently fixed by express agreement between the parties, or by an implied agreement arising out of the use of a particular way. Graves v. Gerber 209
2. The failure of a grant to definitely locate an easement does not give the grantee the right to use the servient estate without limitation. In such a case the grantor may

designate the location, and if he fails to do so the grantee may then make the designation which, in either case, must be reasonable. Graves v. Gerber 209
3. Under certain circumstances, a court of equity may fix the location of a way which the grant does not specifically describe. Graves v. Gerber 209
4. The use of an easement existing by an express grant must be confined to the terms and purposes of the grant. Graves v. Gerber 209
5. An easement of necessity does not arise from an express grant, but is an easement arising either by implied grant or reservation. Such implied easements ordinarily arise in cases where the land owned by one entity is divided by sale of a portion and the beneficial use of one tract or the other depends on an easement for ingress or egress or other purpose. Graves v. Gerber 209

Effectiveness of Counsel.
1. The standard for determining whether defense counsel has rendered constitutionally required effective assistance is whether counsel has performed at least as well as a lawyer with ordinary training and skill in the criminal law in that area and has conscientiously protected the interests of his client.
State v. Shepard 188
State v. Rust 320
2. In order for one to maintain ineffective counsel the record must affirmatively support the claim.
State v. Shepard 188
State v. Pankey 377
3. The determination of sufficiency of counsel must be made within the context of the facts of a particular case, and we will not require defense counsel to develop ridiculous trial tactics because they are suggested by the defendant. State v. Rust 320
4. Error or prejudice allegedly resulting from the ineffective assistance of counsel cannot be established where witnesses were not called, absent a showing in the record of the beneficial nature of such witnesses' testimony. State v. Pankey 377

Eminent Domain.
1. Zoning ordinances are inapplicable to governmental projects for the construction of which the agency in question has the power to condemn or appropriate lands by the power of eminent domain. Witzel v. Village of Brainard 231
2. The general rule is that the propriety of a taking of property by eminent domain is not defeated by the fact that the

purpose for which the property is taken is a use prohibited by the zoning regulations. Witzel v. Village of Brainard 231
3. In an eminent domain proceeding a wide discretion is granted the trial judge in determining the admissibility of sales, and the evidence should not be admitted where there is a marked difference in the situation of the properties or unless the judge is satisfied that the price paid was sufficiently voluntary to be a reasonable index of value. Damme v. Nebraska P.P. Dist. 478

Employer and Employee.
1. A Workmen's Compensation Court determination of employee status, not independent contractor, is affirmed where substantial evidence supports the conclusion and it is not clearly wrong. Employers Ins. of Wausau v. Greater Omaha Trans. Co. 276
2. Under the facts of the case, an injured cabdriver is an employee of the cab campany and entitled to workmen's compensation benefits even though written arrangement is denominated a lease of the cab rather than an employment contract. Employers Ins. of Wausau v. Greater Omaha Trans. Co. 276

Employment Contracts.
1. Where an employer lawfully terminates the employment of an employee, such term of employment is not extended by the receipt of severance pay benefits provided by the employer. The payment of severance pay by the employer and the acceptance of the same by the employee generally manifests a termination of the employment relationship. Feola v. Valmont Industries, Inc. 527
2. In the absence of a promise on the part of the employer that the employment should continue for a period of time that is definite or capable of determination, such employment relationship is terminable at the will of the employer as it constitutes an indefinite hiring. When the employment is not for a definite term and there are no contractual or statutory restrictions upon the right of discharge, an employer may lawfully discharge an employee whenever and for whatever cause he chooses, without incurring liability. Feola v. Valmont Industries, Inc. 527
3. A provision in a contract of employment providing that the employee should have the privilege of terminating his employment at any time, with or without cause, upon written notice, and that the employer should have the same privilege, constitutes a hiring at will. Feola v. Valmont Industries, Inc. 527

Employment Security Law.

1. Under the Nebraska Employment Security Law, Neb. Rev. Stat. §§ 48-601 et seq. (Reissue 1978), the contribution type of financing as provided by § 48-649 and reimbursement financing under § 48-660.01 are separate and distinct systems, and a nonprofit organization must elect to use one or the other. West Nebraska General Hospital v. Hanlon 173
2. The Employment Security Law does not allow a reimbursing employer to acquire the experience account of its contributing predecessor and apply such account against its reimbursement charges. West Nebraska General Hospital v. Hanlon 173
3. The exemption from the term "employment" in Neb. Rev. Stat. § 48-604(6)(o) (Reissue 1978) includes participation in a voluntary work-study program as long as grades and credits received are applied toward the high school degree and it is a part of an approved course of study. Seldin Development & Management Co. v. Chizek 315
4. When a school has certified to an employer that work-study is an integral part of its educational program, the employer should be allowed to rely on that assurance, particularly when such conclusion is adequately supported by the record. Seldin Development & Management Co. v. Chizek 315
5. An employee who desires to retain his employment but resigns or quits because the employer has clearly indicated that if he does not his employment will be terminated has not left his employment "voluntarily," as that term is used in Neb. Rev. Stat. § 48-628(a) (Reissue 1978). School Dist. No. 20 v. Commissioner of Labor 663
6. Neb. Rev. Stat. § 48-646 (Reissue 1978) requires that the amount of attorney fees charged by a lawyer to his client be approved by the Commissioner of Labor. It does not authorize the District Court to award attorney fees for which approval by the commissioner has not been sought. School Dist. No. 20 v. Commissioner of Labor 663

Equity.

1. An appeal from a judgment in an equitable action does not require the filing of a motion for new trial for a de novo review in this court of alleged errors in the findings and judgment of the trial court. To the extent that it conflicts herewith, *McClintock v. Nemaha Valley Schools*, 198 Neb. 477, 253 N.W.2d 304 (1977), is overruled. Petersen v. Petersen 1
2. The law requires this court in determining an appeal in an equity action involving questions of fact to reach an

independent conclusion without reference to the findings of the District Court. In determining the weight of the evidence where there is an irreconcilable conflict on material issues of fact, this court will consider the fact that the trial court observed the witnesses and their manner of testifying.
Nebraska State Bank v. Gaddis 136
Weiss v. Meyer 429
3. A prayer for general equitable relief is to be construed liberally, and will often justify granting relief in addition to that contained in the specific prayer, provided it fairly conforms to the case made by the petition and the evidence. Daugherty v. Ashton Feed & Grain Co., Inc. 159
4. A court of equity which has obtained jurisdiction for any purpose may retain jurisdiction for the purpose of administering complete relief between the parties with respect to the subject matter.
Daugherty v. Ashton Feed & Grain Co., Inc. 159
Graves v. Gerber 209
5. Under certain circumstances, a court of equity may fix the location of a way which the grant does not specifically describe. Graves v. Gerber 209
6. It is the general rule that if a court of equity has properly acquired jurisdiction in a suit for equitable relief, it may make complete adjudication of all matters properly presented and involved in the case and grant relief, legal or equitable, as may be required and thus avoid unnecessary litigation. Miller v. School Dist. No. 69 290
7. It is a common principle of equity that equity delights to do justice and that not by halves, and when equity once acquires jurisdiction it will retain it so as to afford complete relief. Miller v. School Dist. No. 69 290
8. Equity seeks the real and substantial rights of the parties, and applies the remedy in such manner as to relieve those having the controlling equities. Miller v. School Dist. No. 69 290
9. Technicalities are not favorites of law or equity. Courts relish them as instruments to prevent injustice, but not to defeat justice. Miller v. School Dist. No. 69 290
10. Equity looks through forms to substance, or as stated in similar language, a court of equity goes to the root of a matter and is not deterred by forms. Miller v. School Dist. No. 69 290
11. A court of equity will refuse to enforce a contract when it is not clearly satisfied that it embodies the real understanding of the parties. Litz v. Wilson 483

Estoppel.

In order to create an equitable estoppel, the party pleading it must have suffered a loss of a substantial character or been induced to alter his position for the worse in some material respect. Benson v. Ruggles & Burtch v. Benson ... 330

Evidence.

1. Newly discovered evidence must be of such a nature that if it had been offered and admitted at the former trial it probably would have produced a substantially different result. State v. Record 90
2. In determining the sufficiency of the evidence to sustain a conviction in a criminal prosecution, it is not the province of this court to resolve conflicts in the evidence, pass upon the credibility of witnesses, determine the plausibility of explanations, or weigh the evidence, as such matters are for the jury.
   State v. Pena 250
   Tibbs v. Fisher 306
3. Evidence of a defendant's fingerprints has probative value; and it is for the jury to determine, in light of all other evidence, whether such evidence permits an inference to be drawn that beyond a reasonable doubt defendant was the person who committed the offense in question. State v. Pena 250
4. Where different minds may reasonably draw different conclusions or inferences from the evidence adduced concerning the issues of negligence or contributory negligence and the degree thereof when one is compared with the other, such issues must be submitted to the jury. Sullivan v. Geo. A. Hormel and Co. 262
5. An expert, properly qualified, may give an opinion as to the speed of vehicles involved in an automobile accident. However, neither an expert nor lay witness may testify as to his opinion of speed based solely on the fact that a collision occurred. Belitz v. Suhr 280
6. The function of the lay witness is to describe what he has observed and the trier of fact will draw the conclusion from the facts observed and reproduced by the witness. Belitz v. Suhr 280
7. In determining the sufficiency of the evidence to sustain a judgment in a law action, it must be considered most favorably to the successful party, every controverted fact must be resolved in that party's favor, and he must have the benefit of any inferences reasonably deducible from it. Tibbs v. Fisher 306
8. It is competent for the prosecution to put in evidence

all relevant facts and circumstances which tend to establish any of the constituent elements of the crime with which the accused is charged, even though such facts and circumstances may prove or tend to prove that the defendant committed other crimes. State v. Ellis 379

9. A not guilty plea places in issue every relevant fact, and the prosecution should not be precluded from introducing evidence on a certain element of the alleged crime because there was already some other evidence in the case tending to establish the same, until and unless the trial court, in the exercise of its discretion, determines that further evidence on that point is irrelevant. State v. Ellis 379
10. A purported showing of a paucity of evidence does not prove that a trial court abused its discretion in balancing the probative value against the prejudicial effect of a particular item of disputed evidence. In fact, a lack of other relevant evidence may in some instances increase the probative value of the evidence available. State v. Ellis 379
11. The admissibility of evidence of other crimes lies largely within the discretion of the trial court. State v. Ellis 379
12. Evidence of other crimes, if relevant to the issue, is not made inadmissible simply because they occurred at a time after that of the principal charge. State v. Ellis 379
13. In proceedings to review an order of the State Real Estate Commission, the questions to be determined are whether the order of the Commission is supported by substantial evidence, whether the Commission acted within the scope of its authority, and whether its action was arbitrary, capricious, or unreasonable. Wright v. State ex rel. State Real Estate Comm. 467
14. In an eminent domain proceeding a wide discretion is granted the trial judge in determining the admissibility of sales, and the evidence should not be admitted where there is a marked difference in the situation of the properties or unless the judge is satisfied that the price paid was sufficiently voluntary to be a reasonable index of value. Damme v. Nebraska P.P. Dist. 478
15. Improper evidence is not made admissible merely because it is designed to meet other evidence, and this is true regardless of the propriety of the other evidence. Damme v. Nebraska P.P. Dist. 478
16. Determinations made by the Commission of Industrial Relations in accepting or rejecting claimed comparables are within the field of expertise of the Commission of Industrial Relations and should be given due deference. AFSCME Local 2088 v. County of Douglas 511

17. Factors most often used to determine comparability are geographic proximity, population, job descriptions, job skills, and job conditions. AFSCME Local 2088 v. County of Douglas 511
18. Attempting to arrive at comparables requires granting some discretion to the Commission of Industrial Relations; and unless there is no substantial evidence upon which the Commission of Industrial Relations could have concluded that the counties used by the Commission of Industrial Relations did, indeed, provide comparables, we may not as a matter of law disallow the action taken by the Commission of Industrial Relations. AFSCME Local 2088 v. County of Douglas 511
19. Where there are local comparisons which can or should be made, they may not be disregarded if in fact it appears from the evidence that the local employers are comparable in that they meet the requirements of Neb. Rev. Stat. § 48-818 (Reissue 1978). AFSCME Local 2088 v. County of Douglas 511
20. Whenever there is another employer in the same market hiring employees to perform same or similar skills, the salaries paid to those employees must be considered by the Commission of Industrial Relations unless evidence establishes that there are substantial differences which cause the work or conditions of employment to be dissimilar. AFSCME Local 2088 v. County of Douglas 511
21. Where the essential facts presented in a case are undisputed, the decision becomes a question of law to be decided by the court, and the findings of the trial court are essentially conclusions of law. Feola v. Valmont Industries, Inc. 527
22. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. State v. Harper 568
23. This court will not interfere with a conviction based on evidence unless it is so lacking in probative force that as a matter of law it can be said that it is insufficient to support a verdict of guilt beyond a reasonable doubt. State v. Ohler 742

Expert Witnesses.

1. Fingerprint identity testified to by a qualified expert is perhaps the best known method of the highest probative value in establishing identification. State v. Pena 250
2. An expert, properly qualified, may give an opinion as to the speed of vehicles involved in an automobile accident.

However, neither an expert nor lay witness may testify as to his opinion of speed based solely on the fact that a collision occurred. Belitz v. Suhr 280

Fees.

The amount of attorney fees and the amount of referee fees rest in the sound judicial discretion of the trial court and will not be disturbed on appeal in the absence of an abuse of discretion. Sweet v. Fairbairn 286

Governmental Subdivisions.

Where the governmental subdivision does not act on a claim within 2 years after the claim accrued and the claimant does not withdraw the claim within 2 years after the claim accrued, all suits permitted by the Political Subdivisions Tort Claims Act are barred and the additional 6-month period granted under particular circumstances does not apply. Ragland v. Norris P.P. Dist. 492

Guaranty.

A guarantor is entitled to be subrogated to the benefit of all the security and means of payment under the creditor's control, and, in the absence of assent, waiver, or estoppel, the guarantor is generally released by an act of the creditor which deprives the guarantor of such right. Southwest Bank of Omaha v. Herting 347

Habeas Corpus.

The determination by the District Court in a habeas corpus case does not control the proper exercise of the jurisdiction of the county court in a later adoption proceeding. Lum v. Mattley 789

Habitual Criminals.

1. An enhanced sentence imposed under the provisions of the habitual criminal laws, Neb. Rev. Stat. §§ 29-2221 and 29-2222 (Reissue 1979), is not a new jeopardy or additional penalty for the same crime. It is simply a stiffened penalty for the latest crime which is considered to be an aggravated offense because it is a repetitive one. Addison v. Parratt 459
2. Record examined and disclosed that pleas of guilty utilized to prove the defendant to be an habitual criminal, as well as his waiver of counsel, were entered freely, voluntarily, and knowingly. Addison v. Parratt 459

Highways.

1. A motorist approaching a highway protected by stop signs must stop before going upon the highway, must look to

his left and to his right, and must permit a motor vehicle which is proceeding along the highway protected by stop signs to pass if it is at a distance and is traveling at a speed making it imprudent for the motorist to proceed into the intersection. Pickett v. Parks 310
2. The duty of a motorist to look for vehicles approaching on a highway protected by stop signs implies the obligation to see what is in plain view. Pickett v. Parks 310
3. A motorist entering an intersection of highways is obligated to look for approaching automobiles and to see any vehicle within that radius which denotes the limit of danger. Pickett v. Parks 310
4. A traveler on highways may assume, unless and until he has warning, notice, or knowledge to the contrary, that any other user of the highways will use them in a lawful manner, and until he has such warning, notice, or knowledge, he may govern his acts in accordance with such assumption. Pickett v. Parks 310

Homicide.

1. Under present statutes, upon conviction for second degree murder, the court is not authorized to pronounce an indeterminate sentence. The court may impose a sentence of a definite term of years, not less than the minimum authorized by law; or, in the alternative, may impose a sentence of life imprisonment.
   State v. Randall 248
   State v. Stranghoener 598
2. Ordinarily, in a case charging first degree murder, where there is no eyewitness to the act, and the evidence is largely circumstantial, the jury should be instructed as to the law governing murder in the first degree, second degree, and manslaughter. State v. Ellis 379

Identification Procedures.

Fingerprint identity testified to by a qualified expert is perhaps the best known method of the highest probative value in establishing identification. State v. Pena 250

Impeachment.

The crime of petit larceny without proof that the manner in which it was accomplished involved deceit or deception so as to be classified as "crimen falsi" is not such a crime as may be used to impeach a witness' veracity under Neb. Rev. Stat. § 27-609 (Reissue 1979). State v. Ellis 379

Implied Consent Law.

1. Under the Nebraska implied consent statutes a driver

is not entitled to consult with a lawyer prior to taking a test, nor is the test required to be delayed by a request of an arrested motorist that he be permitted to contact a lawyer. Winter v. Peterson 785
2. A single request to submit to a test is sufficient. There is no requirement that a second request be made if the person arrested refuses to submit to the test. Winter v. Peterson 785
3. A conditional or qualified refusal to take a test to determine the alcohol content of body fluids under the implied consent law is not sanctioned by the act and such refusal is a refusal to submit to the test within the meaning of the act. Winter v. Peterson 785
4. A refusal to submit to a chemical test occurs within the meaning of the implied consent law when the licensee, after being asked to submit to a test, so conducts himself as to justify a reasonable person in the requesting officer's position in believing that the licensee understood that he was asked to submit to a test and manifested an unwillingness to take it. Winter v. Peterson 785
5. To constitute a refusal to submit to a chemcial test required under the implied consent statute, the only understanding required by the licensee is an understanding that he has been asked to take a test. It is no defense to refusal that he does not understand the consequences of refusal or is not able to make a reasoned judgment as to what course of action to take. Winter v. Peterson 785

Indictments and Informations.

1. It is only where there is a total failure of competent proof in a criminal case to support a material allegation in the information, or where the testimony adduced is of so weak or doubtful a character that a conviction based thereon could not be sustained, that the trial court will be justified in directing a verdict of not guilty. State v. Ellis 379
2. In the absence of a motion to quash, an information which alleges an attempt to commit an act or acts which if successful would constitute a statutory crime sufficiently charges an attempted crime so as to withstand a jurisdictional attack made for the first time on appeal. To the extent that *Gandy v. The State*, 13 Neb. 445, 14 N.W. 143 (1882), is in conflict with this opinion, it is overruled.
   State v. Sodders 504
   State v. Meredith 637

Injunction.

1. Nonobjection to trivial breaches of a restrictive covenant does not result in loss of the right to enforce the covenant. Meierhenry v. Smith 88

2. Injunction is an appropriate remedy for violation of a restrictive covenant. Meierhenry v. Smith 88
3. Enactment of the Environmental Protection Act does not divest district courts of subject matter jurisdiction to enjoin proposed solid waste disposal areas alleged to be in violation of county zoning ordinances. Omaha Fish and Wildlife Club, Inc. v. Community Refuse, Inc. 110
4. The Department of Environmental Control and county zoning officials are not indispensable parties in a suit against a licensee for a solid waste disposal area where the suit is to enjoin against an alleged violation of a county zoning ordinance. Omaha Fish and Wildlife Club, Inc. v. Community Refuse, Inc. 110
5. An action for a permanent injunction is heard de novo on appeal. Where an action in equity is appealed, it is the duty of this court to try the issues de novo and to reach an independent conclusion without reference to the findings of the District Court. Daugherty v. Ashton Feed & Grain Co., Inc. 159
6. An injunction against a nuisance is an extraordinary remedial process which is granted not as a matter of right but in the exercise of the sound discretion of the court, to be determined on a consideration of all the circumstances of each case. Daugherty v. Ashton Feed & Grain Co., Inc. 159

Insurance.

1. Insurance companies have the same right as individuals to limit their liability. Lavalleur v. State Automobile & Cas. Underwriters 82
2. In construing a contract, the instrument must be read as a whole, giving force and effect to all its provisions to determine whether or not any ambiguity exists and whether, if such ambiguity does exist, the contract is confusing and uncertain in its terms. Lavalleur v. State Automobile & Cas. Underwriters 82
3. In all cases where the beneficiary, or other person entitled thereto, brings an action upon any type of insurance policy except workmen's compensation insurance, or upon any certificate issued by a fraternal beneficiary association, against any company, person, or association doing business in this state, the court, upon rendering judgment against such company, person, or association, shall allow the plaintiff a reasonable sum as an attorney fee in addition to the amount of his recovery, to be taxed as part of the costs. Neb. Rev. Stat. § 44-359 (Reissue 1978). Rieschick Drilling Co. v. American Cas. Co. 142
4. Where an excess insurance clause in a driver's automobile

liability policy and a no-liability clause in the automobile owner's liability policy apparently conflict, the no-liability clause is ineffective and the driver's insurance excess. Jensen v. Universal Underwriters Ins. Co. 487
5. Under the provisions of Neb. Rev. Stat. §§ 25-701 and 25-702 (Reissue 1979), the joinder in a single action of the cause against the uninsured motorist with the insurer carrying the uninsured motorist coverage for the claimant is not permissible. Eich v. State Farm Mut. Automobile Ins. Co. 714
6. In a suit against the uninsured motorist, the amount of uninsured motorist coverage should not be disclosed to the jury. Eich v. State Farm Mut. Automobile Ins. Co. 714
7. The following exclusion in uninsured motorist coverage does not prevent the stacking of coverage where the insured has separate policies of uninsured motorist coverage on two or more vehicles: "(b) TO *BODILY INJURY* TO AN *INSURED* WHILE *OCCUPYING* OR THROUGH BEING STRUCK BY A LAND MOTOR VEHICLE OWNED BY THE NAMED INSURED OR ANY *RESIDENT* OF THE SAME HOUSEHOLD, IF SUCH VEHICLE IS NOT AN *OWNED MOTOR VEHICLE*," and the policy definition of owned motor vehicle includes the motor vehicle described in the declaration. Eich v. State Farm Mut. Automobile Ins. Co. 714

Intent.

1. The provisions and conditions of a will are to be construed by the courts with a view to carrying out the intention of the testator, and the cardinal rule in construing a will is to ascertain and effectuate that intention. Olson v. Sampson ... 18
2. The intention of the testator is to be determined from the language of all the pertinent provisions of the will and, where applicable, the circumstances under which the will was made. Olson v. Sampson 18
3. In searching for the intention of the testator, the court must examine the entire will, consider each of its provisions, give words their generally accepted literal and grammatical meaning, and indulge the presumption that the testator understood the meaning of the words used. Olson v. Sampson 18
4. The intention of the testator must be found within the will, and that intention is the one the testator expressed by the language of the will and not an entertained but unexpressed intention. Olson v. Sampson 18
5. It is the visible and hostile possession, with an intention to possess land occupied under a belief that it belongs to the possessor, that constitutes its adverse character. Nebraska State Bank v. Gaddis 136

6. When a claimant occupies the land of another by actual, open, exclusive, and continuous possession, the owner is placed on notice that his ownership is endangered; and unless he takes proper action within 10 years to protect himself, he is barred from action thereafter and the title of the claimant is complete. It is the nature of the hostile possession that constitutes the warning, not the intent of the claimant when he takes possession. Nebraska State Bank v. Gaddis 136
7. "Claim of ownership" as used in the law of adverse possession means nothing more than the intention of the occupant to appropriate and use the land as his own to the exclusion of all others, irrespective of any semblance or shadow of actual right or title. Weiss v. Meyer 429
8. Adverse possession is founded upon the intent with which an occupant held possession, and can best be determined by his acts. Weiss v. Meyer 429
9. The intent, even though mistaken, is sufficient as where the claimant occupies to the wrong line believing it to be the true line and even though he does not intend to claim more than that described in the deed. Weiss v. Meyer 429
10. In order to constitute an attempt to commit a crime under Neb. Rev. Stat. § 28-201 (Reissue 1979), there must be an intentional act on the part of the defendant which would constitute a substantial step toward the completion of the allegedly attempted crime, assuming that the circumstances at the time were as the defendant believed them to be. State v. Sodders 504

Invitor-Invitee.

The general contractor, in control of the premises where work performance under a contract with the owner is being carried out, owes a duty to persons rightfully on the premises to keep the premises in a reasonably safe condition while the contract is in the course of performance. Sullivan v. Geo. A. Hormel and Co. 262

Issue Preclusion.

1. For the theory of issue preclusion to bar further litigation on a specific issue, the issue concluded must be identical, must have been raised and litigated in the prior action, must have been material and relevant to the disposition of the prior action, and the determination made of the issue in the prior action must have been necessary and essential to the resulting judgment. JED Constr. Co., Inc. v. Lilly 607
2. Identity of parties is not necessary to give validity to a claim of issue preclusion. JED Constr. Co., Inc. v. Lilly 607

3. A stranger to a primary suit can assert the theory of issue preclusion as a defense in a subsequent suit provided other elements of the theory of issue preclusion coincide. JED Constr. Co., Inc. v. Lilly 607

Joinder of Actions.

Under the provisions of Neb. Rev. Stat. §§ 25-701 and 25-702 (Reissue 1979), the joinder in a single action of the cause against the uninsured motorist with the insurer carrying the uninsured motorist coverage for the claimant is not permissible. Eich v. State Farm Mut. Automobile Ins. Co. 714

Judges.

1. By creating a classification of "traffic infractions" by Neb. Rev. Stat. § 39-602(107) (Cum. Supp. 1980), it was not the intention of the Legislature to deprive the nonlawyer associate judges of jurisdiction over this particular classification of offenses. Miller v. Peterson 658
2. "Traffic infractions" are misdemeanors for the purpose of determining the authority of nonlawyer associate judges under the provisions of Neb. Rev. Stat. § 24-519 (Reissue 1979). Miller v. Peterson 658

Judgments.

1. In a trial to the court in a law action, the findings and judgment of the trial court on the facts have the same force as a jury verdict and will not be set aside if there is sufficient competent evidence to support them, and the findings of the court will not be disturbed on appeal unless clearly wrong. Koperski v. Husker Dodge, Inc. 29
2. The judgment of the trial court in an action at law where a jury has been waived has the effect of a verdict of a jury and will not be set aside unless clearly wrong. In determining the sufficiency of the evidence to sustain a judgment in a law action, it must be considered most favorably to the successful party, and every controverted fact must be resolved in that party's favor, and such party must have the benefit of any inferences reasonably deducible from it.
   Rieschick Drilling Co. v. American Cas. Co. 142
   Tibbs v. Fisher 306
3. An unqualified allowance of alimony in gross made before July 6, 1972, whether payable immediately in full or periodically in installments, and whether intended solely as a property settlement or as an allowance for support, or both, is not subject to modification. Watley v. Watley 155
4. In the absence of a judgment or order finally disposing of a case, the Supreme Court has no authority nor jurisdiction to act, and in the absence of such judgment or order the

appeal will be dismissed. Knoell Constr. Co., Inc. v. Hanson 373
5. As a general rule, domestic judgments cannot be collaterally attacked or impeached by the parties for fraud or collusion not going to the jurisdiction, and consent judgments are as conclusive on collateral attack as judgments rendered after trial. Nielsen v. SID No. 229 542
6. In cases involving public interests where the public was a party merely by representation, the persons represented may show fraud or collusion in obtaining the judgment. Nielsen v. SID No. 229 542
7. The purpose of an order nunc pro tunc is to correct the record so that it will truly reflect action actually taken, but which through inadvertence or mistake has not been truly recorded. State v. Al-Hafeez 681
8. The limited remedy available in an application for an order nunc pro tunc will not be extended to question the constitutionality of the actions taken or declined to be taken by the trial court, but is limited to the specific purpose of the proceeding, that is, to correct the record to accurately reflect what actually happened in the proceedings. State v. Al-Hafeez 681

Judicial Notice.

1. This court will not take judicial notice of a municipal ordinance which does not appear in the record. State v. Shea 17
2. Where cases are interwoven and interdependent and the controversy involved has already been considered and determined in a prior proceeding involving one of the parties now before the court, the court has the right to examine its own records and take judicial notice of its own proceedings and judgment in the prior action. Reeves v. Watkins 804

Juries.

1. Where different minds may reasonably draw different conclusions from the evidence as to whether or not they establish negligence, the issues are for the jury. Esbenshade v. National Life Ins. Co. 216
2. In all actions brought to recover damages for injuries to a person or his property, all questions of negligence and contributory negligence shall be for the jury. Neb. Rev. Stat. § 25-1151 (Reissue 1979). Krug v. Laughlin 367

Jurisdiction.

1. The District Court in an action to establish paternity has jurisdiction to award reasonable visitation rights to the

father in an appropriate case. Cox v. Hendricks 23
2. Where a statute provides an adequate remedy at law, equity will not entertain jurisdiction, and the statutory remedy must be exhausted before equity may be resorted to. Koperski v. Husker Dodge, Inc. 29
3. The exclusive original jurisdiction given to the county court sitting as a juvenile court is not diminished by Neb. Rev. Stat. § 43-201 (Reissue 1978) where the child's custody is the subject of a preexisting District Court order issued pursuant to divorce proceedings. In re Interest of Goldfaden 93
4. The juvenile court can intervene between the parents and the child only if the child's condition requires the state to use its power to protect the welfare of the child. The circumstances of the child must come within the juvenile statutes. In re Interest of Goldfaden 93
5. Enactment of the Environmental Protection Act does not divest district courts of subject matter jurisdiction to enjoin proposed solid waste disposal areas alleged to be in violation of county zoning ordinances. Omaha Fish and Wildlife Club, Inc. v. Community Refuse, Inc. 110
6. A court of equity which has obtained jurisdiction for any purpose may retain jurisdiction for the purpose of administering complete relief between the parties with respect to the subject matter.
Daugherty v. Ashton Feed & Grain Co., Inc. 159
Graves v. Gerber 209
7. It is the general rule that if a court of equity has properly acquired jurisdiction in a suit for equitable relief, it may make complete adjudication of all matters properly presented and involved in the case and grant relief, legal or equitable, as may be required and thus avoid unnecessary litigation. Miller v. School Dist. No. 69 290
8. It is a common principle of equity that equity delights to do justice and that not by halves, and when equity once acquires jurisdiction it will retain it so as to afford complete relief. Miller v. School Dist. No. 69 290
9. By creating a classification of "traffic infractions" by Neb. Rev. Stat. § 39-602(107) (Cum. Supp. 1980), it was not the intention of the Legislature to deprive the nonlawyer associate judges of jurisdiction over this particular classification of offenses. Miller v. Peterson 658
10. The Commission of Industrial Relations' authority to resolve disputes concerning terms, tenure, or conditions of employment is limited to situations in which the parties have not yet reached agreement. Once an agreement is reached and a subsequent breach is alleged to have occurred,

the parties are required to litigate their dispute in a competent court having jurisdiction of the matter. Saltz v. School Dist. of Norfolk 740
11. The determination by the District Court in a habeas corpus case does not control the proper exercise of the jurisdiction of the county court in a later adoption proceeding. Lum v. Mattley 789

Juror Qualifications.

Qualified jurors need not be totally ignorant of the facts and issues involved. It is sufficient as to competency to serve if the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court. State v. Ellis 379

Jury Instructions.

1. Where negligence is pleaded and there is no competent evidence to support it, it is prejudicial error to submit such issue to the jury. Simet v. Sage 13
2. A party may not complain that a court erroneously rejected his requested instructions when the substance of the instructions requested is contained in other instructions given by the court. Belitz v. Suhr 280
3. Ordinarily, in a case charging first degree murder, where there is no eyewitness to the act, and the evidence is largely circumstantial, the jury should be instructed as to the law governing murder in the first degree, second degree, and manslaughter. State v. Ellis 379
4. In a suit against the uninsured motorist, the amount of uninsured motorist coverage should not be disclosed to the jury. Eich v. State Farm Mut. Automobile Ins. Co. 714

Jury Verdicts.

1. The verdict of the jury must be sustained if, taking the view most favorable to the State, there is sufficient evidence to support it. State v. Pena 250
2. A jury verdict will not be disturbed unless it is clearly erroneous and against the preponderance of the evidence. Krug v. Laughlin 367
3. It is only where there is a total failure of competent proof in a criminal case to support a material allegation in the information, or where the testimony adduced is of so weak or doubtful a character that a conviction based thereon could not be sustained, that the trial court will be justified in directing a verdict of not guilty. State v. Ellis 379

4. Defects in a verdict which are matters of substance must be corrected before the jury is discharged. Neb. Rev. Stat. § 25-1123 (Reissue 1979). Eich v. State Farm Mut. Automobile Ins. Co. 714

Juvenile Courts.

1. The exclusive original jurisdiction given to the county court sitting as a juvenile court is not diminished by Neb. Rev. Stat. § 43-201 (Reissue 1978) where the child's custody is the subject of a preexisting District Court order issued pursuant to divorce proceedings. In re Interest of Goldfaden 93
2. The juvenile court can intervene between the parents and the child only if the child's condition requires the state to use its power to protect the welfare of the child. The circumstances of the child must come within the juvenile statutes. In re Interest of Goldfaden 93
3. An appeal of a juvenile case is heard by trial de novo upon the record. The findings of fact by the trial court will be accorded great weight because the trial court heard and observed the parties and witnesses, and those findings will not be set aside on appeal unless they are against the weight of the evidence or there is a clear abuse of discretion.
   In re Interest of Goodon 256
   In re Interest of McKee 623
4. An appeal from the separate juvenile court involving termination of parental rights is determined de novo upon the record by this court. In re Interest of Moen 337
5. Where a court order pursuant to Neb. Rev. Stat. § 43-209(6) (Reissue 1978) requires presence of a parent within the jurisdiction of the court for its compliance, a parent who voluntarily leaves the state, making compliance impossible, cannot avail himself of his absence as a basis for setting aside the termination order. In re Interest of Moen 337

Legislative Delegation.

The Legislature cannot delegate its powers to make a law, but it can make a law to become operative on the happening of a certain contingency or on an ascertainment of fact upon which the law intends to make its own action depend. State ex rel. Douglas v. Sporhase 703

Legislative Power.

The Legislature has the power to determine public policy with regard to ground water. State ex rel. Douglas v. Sporhase 703

Legislature.

1. Since the Nebraska common law of ground water permits use of the water only on the overlying land, legislative action is necessary to allow for transfers off the overlying land. State ex rel. Douglas v. Sporhase 703
2. Ground water may be transferred from the overlying land only with the consent of and to the extent prescribed by the public through its elected representatives. State ex rel. Douglas v. Sporhase 703

Liability.

Insurance companies have the same right as individuals to limit their liability. Lavalleur v. State Automobile & Cas. Underwriters 82

Libel and Slander.

Notice consisting solely of a statement of the termination of a prior business or professional relationship is not by itself libelous or slanderous. Tibbs v. Fisher 306

Licenses.

Whenever a guilty plea is utilized to support a judgment of conviction used to support an order revoking a motor vehicle operator's license under Neb. Rev. Stat. § 39-669.27 (Reissue 1978), and it is challenged in District Court, it must appear from the record that there was a judicial acceptance of that plea. Miller v. Peterson 658

Liens.

If an otherwise unperfected lien is not filed at all the proper places at the time of filing, but through the passage of time or change in character of the property becomes a proper filing under the provisions of the Uniform Commercial Code, the lien also becomes properly perfected and has superior rights over all other liens not otherwise perfected prior to the time that the previous security lien was perfected. Genoa Nat. Bank v. Sorensen 423

Liquor Licenses.

1. A liquor license is a purely personal privilege, does not constitute property, and vests no property rights in a licensee which can be transferred. City of Lincoln v. Nebraska Liquor Control Comm. 630
2. Under the statutes of Nebraska, liquor licenses are issued to a single entity and, when so issued, may not be used by anyone else or transferred to anyone else. City of Lincoln v. Nebraska Liquor Control Comm. 630
3. The Nebraska Liquor Control Commission has broad

discretion in determining whether applications for licenses should be granted or denied and courts are without authority to interfere with that discretion unless it has been abused. City of Lincoln v. Nebraska Liquor Control Comm. 630
4. Absence of need alone is not a sufficient reason to deny an otherwise proper application for a liquor license. City of Lincoln v. Nebraska Liquor Control Comm. 630

Master and Servant.

Under the terms of the construction contract here involved, including the general conditions contained in AIA document A201, April 1970 edition, especially the provisions relating to initiating, maintaining, and supervising all safety precautions and programs in connection with the work, including those with reference to safety and cleanup, the relationship of owner and independent contractor was not converted to that of master and servant. Sullivan v. Geo. A. Hormel and Co. 262

Mechanics' Liens.

1. The purpose of Neb. Rev. Stat. § 52-118 (Reissue 1978) is to secure payment to those furnishing labor, material, and equipment rental in the construction or repairing of any public building, structure, or improvement where the general provisions of the mechanic's lien laws do not apply. Dukane Corp. v. Sides Constr. Co. 227
2. Where the general mechanic's lien laws are applicable the lien of a materialman for materials furnished for the erection of a building by virtue of an agreement with the contractor extends to such materials only as are used in or delivered at the building for use therein. Dukane Corp. v. Sides Constr. Co. 227
3. A contractor cannot successfully assert a mechanic's lien upon property where there has been only part performance or a lack of substantial performance of the contract. Reeves v. Watkins 804
4. Objections which go to the validity or existence of the lien or the debt on which it is based may be set up in defense to an action to enforce the lien, and damages for the lienholder's default in performance under the contract giving rise to the debt and lien may be set up to defeat the lien or to reduce the amount collected under it. Reeves v. Watkins.. 804

Mental Health.

1. Under the Nebraska Mental Health Commitment Act, the determination of whether an act of violence is recent must be decided on the basis of all the surrounding facts and circumstances. In re Interest of Blythman 51

2. In order for a past act of violence to have any evidentiary value under such act, it must form some reasonable basis for a prediction of future dangerousness and be probative of that issue. In re Interest of Blythman 51
3. An act occurring 5 years prior to the mental health commitment hearing is recent within the meaning of Neb. Rev. Stat. § 83-1009 (Cum. Supp. 1980) where: (a) There is evidence that the act is still probative of the subject's future dangerousness; (b) The subject has not had an opportunity to commit a more recent act because he has been in confinement; and (c) There is reliable medical evidence that there is a high probability of repetition of such act by the subject. In re Interest of Blythman 51

Mortgages.

The interest of a party claiming under the mortgagor but prior to the mortgage may be determined in an action to foreclose the mortgage. Lakeshore Comm. Finance Corp. v. North Platte H.J. Motel, Inc. 63

Motion to Vacate.

A motion to vacate a judgment and sentence under the Post Conviction Act cannot be used as a substitute for an appeal or to secure a further review of issues already litigated.
State v. Rust 320
State v. Peery 639

Motions for New Trial.

1. An appeal from a judgment in an equitable action does not require the filing of a motion for new trial for a de novo review in this court of alleged errors in the findings and judgment of the trial court. To the extent that it conflicts herewith, *McClintock v. Nemaha Valley Schools*, 198 Neb. 477, 253 N.W.2d 304 (1977), is overruled. Petersen v. Petersen 1
2. A motion for new trial on the ground of newly discovered evidence is addressed to the sound discretion of the trial court and, unless an abuse of discretion is shown, its determination will not be disturbed. State v. Record 90
3. Newly discovered evidence must be of such a nature that if it had been offered and admitted at the former trial it probably would have produced a substantially different result. State v. Record 90
4. Where a trial court judge sustains a motion for a new trial without specifying his reasons therefor, the appellant fulfills his burden by submitting the records to the Supreme Court and contending there is no prejudicial error. The

burden shifts to the appellee to identify any prejudicial error in the record justifying a new trial. Belitz v. Suhr 280
5. In an appeal from an order granting a motion for summary judgment, a motion for new trial is necessary in order for the court on appeal to review alleged errors in evidence. Kramer v. Swanson 794
6. When a motion for new trial is not filed in a law action, the court on appeal will examine the record only for the purpose of determining whether or not the judgment of the trial court is supported by the pleadings. Kramer v. Swanson 794

Motor Vehicles.

1. An expert, properly qualified, may give an opinion as to the speed of vehicles involved in an automobile accident. However, neither an expert nor lay witness may testify as to his opinion of speed based solely on the fact that a collision occurred. Belitz v. Suhr 280
2. A motorist approaching a highway protected by stop signs must stop before going upon the highway, must look to his left and to his right, and must permit a motor vehicle which is proceeding along the highway protected by stop signs to pass if it is at a distance and is traveling at a speed making it imprudent for the motorist to proceed into the intersection. Pickett v. Parks 310
3. The duty of a motorist to look for vehicles approaching on a highway protected by stop signs implies the obligation to see what is in plain view. Pickett v. Parks 310
4. A motorist entering an intersection of highways is obligated to look for approaching automobiles and to see any vehicle within that radius which denotes the limit of danger. Pickett v. Parks 310
5. If a motorist entering an intersection looks for approaching vehicles but fails to see one which is favored over him under the rules of the road, he is guilty of negligence as a matter of law. Pickett v. Parks 310
6. Where an excess insurance clause in a driver's automobile liability policy and a no-liability clause in the automobile owner's liability policy apparently conflict, the no-liability clause is ineffective and the driver's insurance excess. Jensen v. Universal Underwriters Ins. Co. 487
7. Whenever a guilty plea is utilized to support a judgment of conviction used to support an order revoking a motor vehicle operator's license under Neb. Rev. Stat. § 39-669.27 (Reissue 1978), and it is challenged in District Court, it must appear from the record that there was a judicial acceptance of that plea. Miller v. Peterson 658
8. By creating a classification of "traffic infractions" by Neb. Rev. Stat. § 39-602(107) (Cum. Supp. 1980), it was not the

intention of the Legislature to deprive the nonlawyer associate judges of jurisdiction over this particular classification of offenses. Miller v. Peterson 658
9. "Traffic infractions" are misdemeanors for the purpose of determining the authority of nonlawyer associate judges under the provisions of Neb. Rev. Stat. § 24-519 (Reissue 1979). Miller v. Peterson 658

Municipal Corporations.
1. Zoning powers granted to villages under Neb. Rev. Stat. § 19-901 (Reissue 1977) shall be exercised only after the municipal legislative body has appointed a planning commission, received from its planning commission a recommended comprehensive development plan as defined in Neb. Rev. Stat. § 19-903 (Reissue 1977), adopted such comprehensive development plan, and received the specific recommendation of the planning commission on the adoption or amendment of zoning regulations. Village of McGrew v. Steidley 726
2. While the right of a municipal governing body to amend its minutes is very broad in cases where, through inadvertence or misapprehension, a record has been made up defectively, the power of a governing body to amend its minutes is not unlimited or unqualified. The rule permitting an amendment of the minutes should be administered with caution, and the effect of omissions or irregularities in the proceedings of the council cannot be avoided under the guise of correction of the records. Corrections made in the minutes or records of a municipal governing body should be made within a reasonable time. Village of McGrew v. Steidley 726

Municipal Ordinances.
1. This court will not take judicial notice of a municipal ordinance which does not appear in the record. State v. Shea 17
2. The existence of a valid ordinance creating the offense charged will be presumed where the ordinance is not properly set forth in the record. State v. Shea 17

Negligence.
1. Where negligence is pleaded and there is no competent evidence to support it, it is prejudicial error to submit such issue to the jury. Simet v. Sage 13
2. An alleged negligent act or omission is not actionable under the state Tort Claims Act unless it was the proximate cause of an injury. Miller v. State 170
3. Where different minds may reasonably draw different conclusions from the evidence as to whether or not they

establish negligence, the issues are for the jury.
Esbenshade v. National Life Ins. Co. 216
Sullivan v. Geo. A. Hormel and Co. 262
4. With certain exceptions, the employer of an independent contractor is not liable for physical harm caused to another by the acts or omissions of the contractor or his servants. Sullivan v. Geo. A. Hormel and Co. 262
5. The general contractor, in control of the premises where work performance under a contract with the owner is being carried out, owes a duty to persons rightfully on the premises to keep the premises in a reasonably safe condition while the contract is in the course of performance. Sullivan v. Geo. A. Hormel and Co. 262
6. If a motorist entering an intersection looks for approaching vehicles but fails to see one which is favored over him under the rules of the road, he is guilty of negligence as a matter of law. Pickett v. Parks 310
7. In a product liability action under a negligence theory, a plaintiff must establish a duty, a breach, causation, and damages. Morris v. Chrysler Corp. 341
8. When dealing with the liability of a manufacturer of a finished product who puts it on the market to be used without inspection by his customers, if he is negligent, where danger is to be foreseen, there is liability. Morris v. Chrysler Corp. 341
9. The manufacturer's liability extends to the vendee, to all persons whose right or privilege to use the article is derived from him, to any person to whom the vendee sells or gives the chattel or to whom such subvendee or donee sells or gives the chattel, to damage to property caused by the manufacturer's negligence, and also to damage sustained by the negligently manufactured chattel itself. Morris v. Chrysler Corp. 341
10. Proof that the chattel left the manufacturer in a defective state, though not conclusive, is evidence of negligence. Morris v. Chrysler Corp. 341
11. An action for negligence is based on a legal duty owed by the plaintiff to the defendant which has been breached by the plaintiff. Southwest Bank of Omaha v. Herting 347
12. In all actions brought to recover damages for injuries to a person or his property, all questions of negligence and contributory negligence shall be for the jury. Neb. Rev. Stat. § 25-1151 (Reissue 1979). Krug v. Laughlin 367
13. If an actor's conduct is negligent as creating an unreasonable risk of causing either bodily harm or emotional disturbance to another and it results in such emotional disturbance alone without bodily harm or other compensable damage, the actor is not liable for such emotional disturbance. Fournell v. Usher Pest Control Co. 684

14. Under the circumstances here, conduct involving the failure of the defendant to discover termite damage to plaintiffs' house did not create an unreasonable risk of causing bodily harm as a matter of law. Fournell v. Usher Pest Control Co. 684

New Trial.

1. The ordering of a new trial by the trial court is an appropriate discretionary method of granting post conviction relief under Neb. Rev. Stat. § 29-3001 (Reissue 1979). Addison v. Parratt 459
2. The fact that a defendant has served the full sentence imposed for a particular crime is not necessarily a bar to the granting of a new trial because of errors appearing in the earlier conviction. Addison v. Parratt 459
3. The granting of a new trial because of errors occurring at the original trial does not necessarily constitute double jeopardy. Addison v. Parratt 459

Nonprofit Organizations.

1. Under the Nebraska Employment Security Law, Neb. Rev. Stat. §§ 48-601 et seq. (Reissue 1978), the contribution type of financing as provided by § 48-649 and reimbursement financing under § 48-660.01 are separate and distinct systems, and a nonprofit organization must elect to use one or the other. West Nebraska General Hospital v. Hanlon 173
2. The Employment Security Law does not allow a reimbursing employer to acquire the experience account of its contributing predecessor and apply such account against its reimbursement charges. West Nebraska General Hospital v. Hanlon 173

Notice.

1. Any person having direct contractual relationship with a subcontractor but no contractual relationship, express or implied, with the contractor furnishing such bond shall have a right of action upon the bond upon giving written notice to the contractor within 4 months from the date on which such person did or performed the last of the labor, or furnished or supplied the last of the material for which such claim is made, stating with substantial accuracy the amount claimed and the name of the party to whom the material was furnished or supplied or for whom the labor was done or performed. Neb. Rev. Stat. § 52-118.01 (Reissue 1978). Rieschick Drilling Co. v. American Cas. Co. 142
2. The real purpose of prescribing the manner in which an

adverse holding will be manifested is to give notice to the real owner that his title or ownership is in danger so that he may, within the period of limitation, take action to protect his interest. It is the nature of the hostile possession that constitutes the warning, not the intent of the claimant when he takes possession. Weiss v. Meyer 429

Nuisances.

1. An injunction against a nuisance is an extraordinary remedial process which is granted not as a matter of right but in the exercise of the sound discretion of the court, to be determined on a consideration of all the circumstances of each case. Daugherty v. Ashton Feed & Grain Co., Inc. 159
2. Generally, noise is not a nuisance per se, but it may be of such a character as to constitute a nuisance in fact, which may serve as the basis of an action at law or in equity, even though it arises from the operation of a factory, industrial plant, or other lawful business or occupation. Daugherty v. Ashton Feed & Grain Co., Inc. 159
3. Whether noise is sufficient to constitute a nuisance depends upon its effect upon an ordinary reasonable man, that is, a normal person of ordinary habits and sensibilities. Relief cannot be based solely upon the subjective likes and dislikes of a particular plaintiff, and relief must be based upon an objective standard of reasonableness. Daugherty v. Ashton Feed & Grain Co., Inc. 159
4. To justify abatement of a claimed nuisance, the annoyance must be such as to cause actual physical discomfort to one of ordinary sensibilities. There is a presumption, in the absence of evidence to the contrary, that a plaintiff in an action for abatement of a nuisance has ordinary sensibilities. Daugherty v. Ashton Feed & Grain Co., Inc. 159

Parental Duties.

Both parents have duties to their children; a father cannot delegate those duties to the mother of his children and expect to be held harmless if she neglects the children. In re Interest of Kimsey 193

Parental Rights.

1. Under Neb. Rev. Stat. § 43-209 (Reissue 1978), a person's parental rights may be terminated only upon presentation of clear and convincing evidence.
   In re Interest of Kimsey 193
   In re Interest of Goodon 256
   In re Interest of McKee 623
2. The right of parents to maintain the custody of their child is a natural right subject only to the paramount

interest which the public has in the protection of the rights of a child.
In re Interest of Kimsey 193
In re Interest of Witherspoon 755
3. Parental rights may be forfeited by substantial, continuous, and repeated neglect of a child and a failure to discharge the duties of parental care and protection.
In re Interest of Kimsey 193
In re Interest of Witherspoon 755
4. The juvenile court may terminate all parental rights of parents when the court finds such action to be in the best interests of the child or children and it appears by the evidence that one or more of the conditions set out in Neb. Rev. Stat. § 43-209 (Reissue 1978) exist. In re Interest of Goodon 256
5. Parental rights may be terminated where the record shows the parents have continuously and repeatedly neglected the children, have refused to give the children necessary parental care and protection, and such action is in the best interests of the children.
In re Interest of Moen 337
In re Interest of Campbell 374
In re Interest of Cook 549
6. Where a court order pursuant to Neb. Rev. Stat. § 43-209(6) (Reissue 1978) requires presence of a parent within the jurisdiction of the court for its compliance, a parent who voluntarily leaves the state, making compliance impossible, cannot avail himself of his absence as a basis for setting aside the termination order. In re Interest of Moen 337
7. Proceedings involving the termination of parental rights are reviewed de novo in this court. In re Interest of Campbell 374
8. When natural parents cannot rehabilitate themselves within a reasonable time after the adjudication hearing, the best interests of the child require that a final disposition be made without delay. In re Interest of McKee 623
9. In a proceeding to terminate parental rights under Neb. Rev. Stat. § 43-209(6) (Reissue 1978), there must be a determination that the child is one described in subsection (1) or (2) of Neb. Rev. Stat. § 43-202 (Reissue 1978), and that reasonable efforts, under the direction of the court, have failed to correct the conditions leading to that determination. In re Interest of Witherspoon 755

Parties.

1. The interest of a party claiming under the mortgagor but prior to the mortgage may be determined in an action

to foreclose the mortgage. Lakeshore Comm. Finance Corp. v. North Platte H.J. Motel, Inc. 63
2. The Department of Environmental Control and county zoning officials are not indispensable parties in a suit against a licensee for a solid waste disposal area where the suit is to enjoin against an alleged violation of a county zoning ordinance. Omaha Fish and Wildlife Club, Inc. v. Community Refuse, Inc. 110
3. The granting of leave to file a third-party complaint is a matter entirely within the discretion of the trial court. Bank of Valley v. Shunk 200

Partition.

1. The restrictive provisions of a warranty deed from a father to his children which provided that none of the grantees could mortgage any part of said lands except to one of the other grantees and giving each grantee the option to purchase a part of the land in the event one of the grantees should desire to sell his share, it being the intention of the grantor that said property remain within the family, are satisfied by the voluntary execution of warranty deeds by all the grantees to the grandchildren of the original grantor. Thus, there is no bar to an action in partition between the two grandchildren of the original grantor. Sweet v. Fairbairn 286
2. If the shares confirmed by the judgment in partition and the existence of all encumbrances of which the plaintiff had actual or constructive notice were accurately pleaded in the original petition of the plaintiff, attorney fees shall be awarded entirely to the attorney for the plaintiff. This amount as well as a reasonable fee for the referee shall be taxed as costs in the proceedings. Sweet v. Fairbairn 286
3. The amount of attorney fees and the amount of referee fees rest in the sound judicial discretion of the trial court and will not be disturbed on appeal in the absence of an abuse of discretion. Sweet v. Fairbairn 286

Paternity.

1. In a paternity action where paternity has been admitted and the natural father has demonstrated a familial relationship with the child and has fulfilled parental responsibilities of support and maintenance, the fact that the child was born out of wedlock should be disregarded, and custody and visitation of minor children should be determined on the basis of the best interests of the children. In

determining with which of the natural parents the children shall remain, the standards set out in Neb. Rev. Stat. § 42-364 (Reissue 1978) are to be applied. Cox v. Hendricks .. 23
2. The District Court in an action to establish paternity has jurisdiction to award reasonable visitation rights to the father in an appropriate case. Cox v. Hendricks 23

Petit Larceny.

The crime of petit larceny without proof that the manner in which it was accomplished involved deceit or deception so as to be classified as "crimen falsi" is not such a crime as may be used to impeach a witness' veracity under Neb. Rev. Stat. § 27-609 (Reissue 1979). State v. Ellis 379

Pleadings.

1. Where negligence is pleaded and there is no competent evidence to support it, it is prejudicial error to submit such issue to the jury. Simet v. Sage 13
2. Where a certain theory has been adopted and relied upon by the parties during the trial, such theory will be adhered to on appeal regardless of whether it is correct. Rieschick Drilling Co. v. American Cas. Co. 142
3. On appeal to this court, a case will be considered upon the theory upon which the case was tried below, even though not pleaded, where the parties have acquiesced in the theory and the case was submitted to the trial court on that basis. Rieschick Drilling Co. v. American Cas. Co. .. 142
4. A prayer for general equitable relief is to be construed liberally, and will often justify granting relief in addition to that contained in the specific prayer, provided it fairly conforms to the case made by the petition and the evidence. Daugherty v. Ashton Feed & Grain Co., Inc. 159
5. A demurrer ore tenus is a permissible practice; and if a pleading to which it is addressed is totally defective, it is error to admit any evidence under such pleading. Newman Grove Creamery Co. v. Deaver 178
6. Under our system of code pleading, a party is required to plead the fact, not the theory of recovery or defense; and generally speaking, the pleading of legal conclusions is insufficient to raise an issue of fact. Newman Grove Creamery Co. v. Deaver 178
7. Where an objection that a pleading does not state a cause of action or a defense is interposed for the first time during the trial of a cause or after verdict, the pleading must be liberally construed in light of the entire record, and, if possible, sustained. Newman Grove Creamery Co. v. Deaver 178
8. Generally, it constitutes an abuse of discretion to sustain

a demurrer without leave to amend where there is a reasonable possibility that the defect can be cured by amendment. Newman Grove Creamery Co. v. Deaver 178
9. The granting of leave to file a third-party complaint is a matter entirely within the discretion of the trial court. Bank of Valley v. Shunk 200
10. An order overruling a motion for leave to amend pleadings is interlocutory and not appealable. Knoell Constr. Co., Inc. v. Hanson 373
11. Exhibits not identified as an attachment to any pleading nor as part of an order or entry of any kind are not part of the pleadings. Kramer v. Swanson 794
12. A party cannot recover upon a quantum meruit where he pleads and relies during the trial solely upon an expressed contract. Reeves v. Watkins 804

Pleas.

1. The standard for determining the validity of a guilty plea is whether or not it represents a voluntary and intelligent choice among the alternative courses of action open to the defendant. State v. Shepard 188
2. A not guilty plea places in issue every relevant fact, and the prosecution should not be precluded from introducing evidence on a certain element of the alleged crime because there was already some other evidence in the case tending to establish the same, until and unless the trial court, in the exercise of its discretion, determines that further evidence on that point is irrelevant. State v. Ellis 379
3. Record examined and disclosed that pleas of guilty utilized to prove the defendant to be an habitual criminal, as well as his waiver of counsel, were entered freely, voluntarily, and knowingly. Addison v. Parratt 459
4. The voluntary entry of a plea of guilty to a charge of contempt waives formal defects in the information, affidavit, or accusation. State v. Wostoupal 555
5. Whenever a guilty plea is utilized to support a judgment of conviction used to support an order revoking a motor vehicle operator's license under Neb. Rev. Stat. § 39-669.27 (Reissue 1978), and it is challenged in District Court, it must appear from the record that there was a judicial acceptance of that plea. Miller v. Peterson 658

Political Subdivisions.

1. The provisions of a statute requiring the spreading upon the record of the governing body the vote on an action taken are intended to require an indisputable record of the action actually taken, so that the public might have

an opportunity to know how the elected officials voted thereon. State ex rel. Schuler v. Dunbar 69
2. A governing body may, under some circumstances, correct its own record, nunc pro tunc, to show the adoption of a motion, resolution, or ordinance, and to record the truth of how it was voted upon. It may not, however, by such action show that the separate requirement that these actions be spread upon the record of the minutes of the governing body was performed prior to the time that the spreading upon the minutes actually took place. State ex rel. Schuler v. Dunbar 69
3. The provisions of Neb. Rev. Stat. § 84-1413(2) (Reissue 1976), providing: "The record shall state how each member voted, or if the member was absent or not voting," cannot be satisfied by a nunc pro tunc amendment showing the recording of the vote in the minutes was performed prior to the time the actual recording in the minutes took place. State ex rel. Schuler v. Dunbar 69

Post Conviction.

1. Matters relating to sentences imposed within statutory limits and matters already litigated or which could have been raised are not properly included in an action seeking post conviction relief. State v. Shepard 188
2. A defendant in a post conviction proceeding may not raise questions which could have been raised on direct appeal and which do not involve questions making the judgment of conviction void or voidable under the state or federal Constitutions. State v. Shepard 188
3. In a post conviction proceeding, the petitioner has the burden of establishing a basis for relief.
   State v. Shepard 188
   State v. Pankey 377
4. A motion to vacate a judgment and sentence under the Post Conviction Act cannot be used as a substitute for an appeal or to secure a further review of issues already litigated.
   State v. Rust 320
   State v. Peery 639
5. The defendant has the burden of establishing a basis for relief in a post conviction proceeding and the findings of the District Court in denying such relief will not be disturbed on appeal unless they are clearly erroneous. State v. Rust 320
6. The ordering of a new trial by the trial court is an appropriate discretionary method of granting post conviction relief under Neb. Rev. Stat. § 29-3001 (Reissue 1979). Addison v. Parratt 459

Presentence Reports.

Any presentence report or psychiatric examination shall be privileged and shall not be disclosed directly or indirectly to anyone other than a judge, probation officers to whom an offender's file is duly transferred, or others entitled by law to receive such information. The court may permit inspection of the report or examination of parts thereof by the offender or his attorney, or other persons having a proper interest therein, whenever the court finds it is in the best interest of a particular offender. The court may allow fair opportunity for an offender to provide additional information for the court's consideration. Neb. Rev. Stat. § 29-2261(5) (Reissue 1979). State v. Stranghoener 598

Presumptions.

The existence of a valid ordinance creating the offense charged will be presumed where the ordinance is not properly set forth in the record. State v. Shea 17

Pretrial Conferences.

The purpose of a pretrial conference is to simplify and to narrow the issues of the case and to avoid traps and surprises. Newman Grove Creamery Co. v. Deaver 178

Principal and Surety.

Within the meaning of a payment bond which imposed the duty to pay for labor and materials "used or reasonably required for use in the performance of the contract," the phrase "reasonably required for use" was no more than a clause protecting the surety from excessive and unreasonable claims. Dukane Corp. v. Sides Constr. Co. 227

Prior Acts.

1. Under the Nebraska Mental Health Commitment Act, the determination of whether an act of violence is recent must be decided on the basis of all the surrounding facts and circumstances. In re Interest of Blythman 51
2. In order for a past act of violence to have any evidentiary value under such act, it must form some reasonable basis for a prediction of future dangerousness and be probative of that issue. In re Interest of Blythman 51
3. An act occurring 5 years prior to the mental health commitment hearing is recent within the meaning of Neb. Rev. Stat. § 83-1009 (Cum. Supp. 1980) where: (a) There is evidence that the act is still probative of the subject's future dangerousness; (b) The subject has not had an opportunity to commit a more recent act because he has been

in confinement; and (c) There is reliable medical evidence that there is a high probability of repetition of such act by the subject. In re Interest of Blythman 51

Probable Cause.

1. The test of probable cause for a warrantless arrest is whether at the moment the facts and circumstances within the officers' knowledge and of which they had reasonably trustworthy information were sufficient to warrant a prudent man in believing that the petitioner had committed or was committing an offense. State v. Jones 641
2. Knowledge on the part of law enforcement officers of previous law violations of a suspect is a factor to be considered in establishing probable cause for search or arrest for a similar crime. State v. Jones 641

Product Liability.

1. The theory of strict liability in tort should be distinguished from the theories of liability based on negligence or on breach of warranty, express or implied, in a product liability action. Morris v. Chrysler Corp. 341
2. In a product liability action under a negligence theory, a plaintiff must establish a duty, a breach, causation, and damages. Morris v. Chrysler Corp. 341
3. When dealing with the liability of a manufacturer of a finished product who puts it on the market to be used without inspection by his customers, if he is negligent, where danger is to be foreseen, there is liability. Morris v. Chrysler Corp. 341
4. The manufacturer's liability extends to the vendee, to all persons whose right or privilege to use the article is derived from him, to any person to whom the vendee sells or gives the chattel or to whom such subvendee or donee sells or gives the chattel, to damage to property caused by the manufacturer's negligence, and also to damage sustained by the negligently manufactured chattel itself. Morris v. Chrysler Corp. 341
5. Proof that the chattel left the manufacturer in a defective state, though not conclusive, is evidence of negligence. Morris v. Chrysler Corp. 341

Proof.

1. The burden of proof is upon the plaintiff to show by a preponderance of the evidence that the disability sustained was caused by or related to the accident and was not the result of the normal progression of plaintiff's preexisting condition. Aguallo v. Western Potato, Inc. 66
2. There being no specific standard by which reasonable

value of labor and materials furnished shall be proved, prima facie proof thereof is made where a reasonable inference of such value flows from the evidence adduced. Rieschick Drilling Co. v. American Cas. Co. 142

3. In a post conviction proceeding, the petitioner has the burden of establishing a basis for relief.
   State v. Shepard 188
   State v. Rust 320
   State v. Pankey 377
4. It is competent for the prosecution to put in evidence all relevant facts and circumstances which tend to establish any of the constituent elements of the crime with which the accused is charged, even though such facts and circumstances may prove or tend to prove that the defendant committed other crimes. State v. Ellis 379
5. One who claims title by adverse possession must prove by a preponderance of the evidence that he has been in actual, continuous, exclusive, notorious, and adverse possession under a claim of ownership for a full period of 10 years. Weiss v. Meyer 429
6. Adverse possession is founded upon the intent with which an occupant held possession, and can best be determined by his acts. Weiss v. Meyer 429
7. The defendant has the burden of proving nonwaiver and he must show by a preponderance of the evidence that he did not intelligently and understandingly waive that right. State v. Rogers 464
8. The determination of whether the defendant's conduct constituted a substantial step toward the completion of the crime is a question of fact. State v. Sodders 504

Property.

1. The promise in a land sales contract for the seller to convey real estate is consideration for the promise of the buyer to purchase the real estate. Litz v. Wilson 483
2. Where a land sales contract is executory and the vendee makes default, the remedies of the vendor are to rescind, specific performance, foreclosure of the contract as a mortgage, or bring suit for damages for the breach. Litz v. Wilson 483

Property Division.

1. There is no mathematical formula by which awards for alimony or division of property in an action for dissolution of marriage can be precisely determined. They are to be determined by the facts of each case and the court will consider all pertinent facts in reaching an award that is just and equitable. Cole v. Cole 562

2. When dissolution of a marriage is decreed, the court may order payment of such alimony by one party to the other and division of property as may be reasonable, having regard for the circumstances of the parties. Cole v. Cole 562

Prosecuting Attorneys.

A prosecutor may impeach a witness in court but he may not intimidate him in or out of court. State v. Ammons 797

Prosecutorial Misconduct.

Whether misconduct on the part of a prosecuting attorney is prejudicial to the defendant depends largely upon the facts of each particular case. State v. Ellis 379

Public Meetings.

1. The provisions of a statute requiring the spreading upon the record of the governing body the vote on an action taken are intended to require an indisputable record of the action actually taken, so that the public might have an opportunity to know how the elected officials voted thereon. State ex rel. Schuler v. Dunbar 69
2. A governing body may, under some circumstances, correct its own record, nunc pro tunc, to show the adoption of a motion, resolution, or ordinance, and to record the truth of how it was voted upon. It may not, however, by such action show that the separate requirement that these actions be spread upon the record of the minutes of the governing body was performed prior to the time that the spreading upon the minutes actually took place. State ex rel. Schuler v. Dunbar 69
3. The provisions of Neb. Rev. Stat. § 84-1413(2) (Reissue 1976), providing: "The record shall state how each member voted, or if the member was absent or not voting," cannot be satisfied by a nunc pro tunc amendment showing the recording of the vote in the minutes was performed prior to the time the actual recording in the minutes took place. State ex rel. Schuler v. Dunbar 69
4. While the right of a municipal governing body to amend its minutes is very broad in cases where, through inadvertence or misapprehension, a record has been made up defectively, the power of a governing body to amend its minutes is not unlimited or unqualified. The rule permitting an amendment of the minutes should be administered with caution, and the effect of omissions or irregularities in the proceedings of the council cannot be avoided under the guise of correction of the records. Corrections made in the minutes or records of a municipal governing body should be made within a reasonable time. Village of McGrew v. Steidley 726

5. The purpose of a nunc pro tunc correction is to make the record speak the truth. Its purpose is not to correct oversights or failures in the performance of mandatory acts. Village of McGrew v. Steidley 726

Public Officers and Employees.

No public employer shall withhold pay raises otherwise determined to be granted to public employees in a given year solely on the basis that they are then engaged in a labor dispute over a previous year's wages. AFSCME Local 2088 v. County of Douglas 511

Quantum Meruit.

A party cannot recover upon a quantum meruit where he pleads and relies during the trial solely upon an expressed contract. Reeves v. Watkins 804

Questions of Law.

Where the essential facts presented in a case are undisputed, the decision becomes a question of law to be decided by the court, and the findings of the trial court are essentially conclusions of law. Feola v. Valmont Industries, Inc. 527

Real Estate.

No estate or interest in land, other than leases for a term of 1 year from the making thereof, nor any trust or power over or concerning lands, or in any manner relating thereto, shall hereafter be created, granted, assigned, surrendered, or declared, unless by operation of law, or by deed of conveyance in writing, subscribed by the party creating, granting, assigning, surrendering, or declaring the same. Neb. Rev. Stat. § 36-103 (Reissue 1978). Guynan v. Guynan 775

Records.

1. Where there is no bill of exceptions on appeal, this court is limited to a determination of whether the pleadings support the judgment of the trial court. Lum v. Mattley 789
2. In the absence of a bill of exceptions, the findings of the trial court with respect to the best interests of the child must be taken as correct. Lum v. Mattley 789

Res Judicata.

1. For purposes of res judicata, a judgment decides all issues essential to support it and those assumed or decided in leading to and supporting the final conclusion as well as the ultimate decision. Nielsen v. SID No. 229 542
2. Any right, fact, or matter in issue, and directly adjudicated

upon, or necessarily involved in, the determination of an action before a competent court in which a judgment or decree is rendered upon the merits is conclusively settled by the judgment therein and cannot again be litigated between the parties and privies whether the claim or demand, purpose, or subject matter of the two suits is the same or not. Nielsen v. SID No. 229 542

Restrictive Covenants.

1. Nonobjection to trivial breaches of a restrictive covenant does not result in loss of the right to enforce the covenant. Meierhenry v. Smith 88
2. Injunction is an appropriate remedy for violation of a restrictive covenant. Meierhenry v. Smith 88

Revocation.

1. Under Neb. U.C.C. § 2-608 (Reissue 1971), the buyer may revoke his acceptance of a lot or commercial unit where nonconformity substantially impairs its value to him if he has accepted it on the reasonable assumption that its nonconformity would be cured and it has not been seasonably cured. Revocation of acceptance must occur within a reasonable time after the buyer discovers or should have discovered the ground for it. Koperski v. Husker Dodge, Inc. 29
2. Under the Uniform Commercial Code, the questions of whether goods are substantially impaired by nonconformity or whether revocation of acceptance is given within a reasonable time are questions of fact to be determined by the jury or trier of facts. Koperski v. Husker Dodge, Inc. 29
3. The State Real Estate Commission may, upon its own motion, and shall, upon the sworn complaint in writing of any person, investigate the actions of any broker and shall have power to revoke or suspend any license or certificate issued under Neb. Rev. Stat. §§ 81-885.01 to 81-885.47 (Reissue 1976) whenever the license or certificate has been obtained by false or fraudulent representation or the licensee or certificate holder has been found guilty of the following unfair trade practice, i.e., demonstrating unworthiness or incompetency to act as a broker, associate broker, or salesman. Neb. Rev. Stat. § 81-885.24(28) (Reissue 1976). Wright v. State ex rel. State Real Estate Comm. 467
4. A real estate broker's license may be suspended or revoked for misconduct occurring in a real estate transaction whether the broker is acting for himself or others. Wright v. State ex rel. State Real Estate Comm. 467

Right to Counsel.

1. An accused may waive his right to counsel where such waiver is made intelligently and understandingly, with knowledge of the right to counsel. State v. Rogers 464
2. The defendant has the burden of proving nonwaiver and he must show by a preponderance of the evidence that he did not intelligently and understandingly waive that right. State v. Rogers 464
3. One may insist upon representing himself no matter how foolhardy that decision is, if made knowingly and intelligently; and once that decision is made, the individual making that choice must accept the consequences of his election. State v. Rogers 464
4. Under the Nebraska implied consent statutes a driver is not entitled to consult with a lawyer prior to taking a test, nor is the test required to be delayed by a request of an arrested motorist that he be permitted to contact a lawyer. Winter v. Peterson 785

Rules of Evidence.

The "other-crimes" rule, Neb. Rev. Stat. § 27-404(2) (Reissue 1979), is a rule of relevance and such evidence is ordinarily prejudicial because prior criminal activity is irrelevant to the proof of a specific crime. State v. Ellis 379

Sales.

1. Under Neb. U.C.C. § 2-316(3) (Reissue 1971), all implied warranties are excluded by expressions like "as is," "with all faults," or other language which in common understanding calls the buyer's attention to the exclusion of warranties and makes plain that there is no implied warranty. Koperski v. Husker Dodge, Inc. 29
2. Where an action is based upon defendant's express representation made to the particular plaintiff in advertising or otherwise, courts generally hold that the plaintiff need not be in privity with the defendant to recover under breach of express warranty. The only limitation is that the plaintiff must be a party whom the defendant could expect to act upon the representation. Koperski v. Husker Dodge, Inc. 29
3. Under Neb. U.C.C. § 2-719 (Reissue 1971), a warranty agreement may provide for remedies in addition to or in substitution for those provided in this article and may limit or alter the measure of damages recoverable under this article, as by limiting the buyer's remedies to return of the goods and repayment of the price or to repair and replacement of nonconforming goods or parts. Koperski v. Husker Dodge, Inc. 29

4. Language of a warranty limiting the buyer's remedies to repair and replacement of defective parts is not, on its face, unconscionable. Koperski v. Husker Dodge, Inc. 29
5. The promise in a land sales contract for the seller to convey real estate is consideration for the promise of the buyer to purchase the real estate. Litz v. Wilson 483
6. Where a land sales contract is executory and the vendee makes default, the remedies of the vendor are to rescind, specific performance, foreclosure of the contract as a mortgage, or bring suit for damages for the breach. Litz v. Wilson 483

Sanitary and Improvement Districts.

1. In a derivative action by a taxpayer on behalf of a sanitary and improvement district the taxpayer has no rights greater than the rights the district itself possesses. Nielsen v. SID No. 229 542
2. In order to render an assessment for improvements valid, the improvements may be constructed only on land in which the public has title or at least a valid easement. Nielsen v. SID No. 229 542

Schools and School Districts.

1. The action of the statutory board under Neb. Rev. Stat. § 79-403 (Reissue 1976) is an exercise of quasi-judicial power, equitable in character, and upon appeal therefrom to the District Court the cause is triable de novo as though it had been originally instituted in such court, and upon appeal from the District Court to this court it is triable de novo as in any other equitable action. Miller v. School Dist. No. 69 290
2. Where all the acts necessary to effect accreditation of a school district have been met prior to the statutory board ordering the transfer, and in fact the formal certification is granted prior to the time the children begin school and prior to the time the District Court acts on the appeal, the issue of the accreditation of the new district must be considered to have become moot and the transfer deemed to be permitted on the question of accreditation. Miller v. School Dist. No. 69 290
3. Probationary teachers in Class I, II, III, and VI schools are not entitled to notice of conditions constituting just cause for termination because their contracts are not continuing and no cause need be shown to terminate them. Meyer v. Board of Education 302

Search and Seizure.

1. Knowledge on the part of law enforcement officers of

previous law violations of a suspect is a factor to be considered in establishing probable cause for search or arrest for a similar crime. State v. Jones 641
2. The capacity of a person to claim the protection of the fourth amendment depends not upon a property right in the invaded place, but upon whether the person who claims the protection of the amendment has a legitimate expectation of privacy in the invaded place. State v. Ohler 742
3. A person cannot assert any expectation of privacy in an area in which he gave governmental officials the permission to inspect. State v. Ohler 742
4. The question as to whether or not consent to search was freely and intelligently given is a question of fact to be determined from the totality of all the circumstances surrounding such search. State v. Ohler 742

Self-Incrimination.

It is not error for a trial court to limit cross-examination of a witness concerning a subject wherein the witness has claimed the privilege against self-incrimination. State v. Ellis 379

Sexual Assault.

1. The mentally disordered sex offender act, Neb. Rev. Stat. §§ 29-2911 to 29-2921 (Reissue 1979), does not authorize the courts of this state to review criminal proceedings unrelated to a defendant's status as a sex offender. State v. Irwin 123
2. Upon a delayed sentencing for a sexual offense, credit must be given for time spent in confinement under a commitment as a sexual sociopath based on the same sexual offense. State v. Moore 240
3. Where delayed consecutive sentences for sexual offenses are pronounced, credit for time served under a prior sexual sociopath commitment based on the same sexual offenses is to be applied to the first sexual sentence to be served. Only excess credit, if any, is to be applied to any consecutive sexual sentence to be served later. Credit shall not be applied on any sentence until the defendant commences to serve the sentence. State v. Moore 240

Sexual Misconduct.

Custody of minor children is to be determined by their best interests. In making this determination, the sexual misconduct of a parent is only one of several factors to be considered. Other factors are general considerations of the moral fitness of the parents; the emotional relationships between the children and their parents; and the age, sex, and health of the children. Ritchey v. Ritchey 100

Sexual Sociopath.

1. Upon a delayed sentencing for a sexual offense, credit must be given for time spent in confinement under a commitment as a sexual sociopath based on the same sexual offense. State v. Moore 240
2. Where delayed consecutive sentences for sexual offenses are pronounced, credit for time served under a prior sexual sociopath commitment based on the same sexual offenses is to be applied to the first sexual sentence to be served. Only excess credit, if any, is to be applied to any consecutive sexual sentence to be served later. Credit shall not be applied on any sentence until the defendant commences to serve the sentence. State v. Moore 240

Sentences.

1. In the absence of an abuse of discretion, a sentence imposed within statutory limits will not be disturbed on appeal.
   State v. Irwin 123
   State v. Wredt 184
2. Matters relating to sentences imposed within statutory limits and matters already litigated or which could have been raised are not properly included in an action seeking post conviction relief. State v. Shepard 188
3. A sentence validly imposed takes effect from the time it is pronounced and a subsequent sentence, fixing a different term, is a nullity.
   State v. Cousins 245
   State v. Sliva 647
4. The general rule applies to valid sentences even where the sentencing judge indicates that the change is intended only to correct an ambiguity or a prior misstatement. State v. Cousins 245
5. Under present statutes, upon conviction for second degree murder, the court is not authorized to pronounce an indeterminate sentence. The court may impose a sentence of a definite term of years, not less than the minimum authorized by law; or, in the alternative, may impose a sentence of life imprisonment.
   State v. Randall 248
   State v. Stranghoener 598
6. 1975 Neb. Laws, L.B. 567, made no changes in the provisions for consolidation of consecutive sentences and the pertinent provisions of Neb. Rev. Stat. § 83-1,110(2) (Reissue 1976) pertaining to consolidation are to be applied to consecutive sentences whether imposed before or after the effective date of L.B. 567. Gochenour v. Bolin 444
7. Our holding in *Johnson & Cunningham v. Exon*, 199 Neb. 154, 256 N.W.2d 869 (1977), that approval of the Board of

Pardons was required to apply L.B. 567 retroactively pertained only to those changes in the statute which would result in discharge from custody of the prisoner at an earlier date than before the amendments made by L.B. 567. Gochenour v. Bolin 444

8. Where an accused is convicted of both second and third degree assault, it is not necessarily an abuse of discretion to impose a more severe sentence for the lesser assault than that imposed for the greater. State v. Hatwan 450
9. The fact that a defendant has served the full sentence imposed for a particular crime is not necessarily a bar to the granting of a new trial because of errors appearing in the earlier conviction. Addison v. Parratt 459
10. An enhanced sentence imposed under the provisions of the habitual criminal laws, Neb. Rev. Stat. §§ 29-2221 and 29-2222 (Reissue 1979), is not a new jeopardy or additional penalty for the same crime. It is simply a stiffened penalty for the latest crime which is considered to be an aggravated offense because it is a repetitive one. Addison v. Parratt 459
11. The crediting of prior jail time to a sentence imposed for the minimum sentence permitted by statute is discretionary with the sentencing judge. Addison v. Parratt 459
12. A sentencing judge has broad discretion as to the source and type of evidence or information which may be used as assistance in determining the kind and extent of the punishment to be imposed, and the judge may consider probation officer reports, police reports, affidavits, and other information, including his own personal observations. State v. Stranghoener 598
13. A sentencing judge is not bound by the recommendations of the probation officer in determining the sentence to be imposed. State v. Stranghoener 598
14. Among the factors meriting consideration when sentence is imposed are the family ties, age, mentality, education, experience, and social and cultural background of the convicted criminal; his willingness to work at honest labor; his past criminal record or law-abiding conduct; the motivation for the offense, the nature of the offense, and the amount of violence, if any, involved in the commission of the offense. State v. Stranghoener 598

Special Assessments.

In order to render an assessment for improvements valid, the improvements may be constructed only on land in which the public has title or at least a valid easement. Nielsen v. SID No. 229 542

Specific Performance.

1. As a general rule, where a valid contract exists, which is definite and certain in its terms, mutual in obligation, and free from unfairness, fraud, or overreaching, a court will grant a decree of specific performance where the remedy at law is inadequate and specific performance will not be inequitable or unjust. Litz v. Wilson 483
2. The burden is on the party seeking specific performance to show his right in equity and good conscience to the relief sought by clear and satisfactory evidence. Litz v. Wilson 483
3. In order for equity to recognize a promise to create a trust in the future when a property or property interest comes into existence, the promise must be supported by a consideration. If no consideration exists, the promise is not specifically enforceable. Kully v. Goldman 760
4. One seeking specific performance of an oral contract to leave property to another has the burden of proving not only the contract but also that he has performed the obligations imposed upon him thereunder. Guynan v. Guynan 775
5. Nothing contained in Neb. Rev. Stat. §§ 36-101 to 36-106 (Reissue 1978) shall be construed to abridge the powers of a court of equity to compel the specific performance of agreements in cases of part performance. Neb. Rev. Stat. § 36-106 (Reissue 1978). Guynan v. Guynan 775
6. Before specific performance of an oral contract to convey real estate will be decreed, the acts claimed to be in part performance themselves must unequivocally indicate the existence of the contract. Guynan v. Guynan 775

Speedy Trial.

The requirement of Neb. Rev. Stat. § 29-1207 (Reissue 1979) that a defendant be brought to trial within 6 months of the filing of the information refers to 6 calendar months, not 180 days. State v. Jones 641

Statute of Frauds.

An auction of real estate without reserve is within the statute of frauds. Neb. Rev. Stat. § 36-105 (Reissue 1978). Benson v. Ruggles & Burtch v. Benson 330

Statute of Limitations.

1. In Nebraska the law is settled that the operation of the statute of limitations is to vest absolute title in the occupant, when he has maintained an actual, continued, notorious, and adverse possession under claim of ownership for the statutory period. Weiss v. Meyer 429

2. Where the governmental subdivision does not act on a claim within 2 years after the claim accrued and the claimant does not withdraw the claim within 2 years after the claim accrued, all suits permitted by the Political Subdivisions Tort Claims Act are barred and the additional 6-month period granted under particular circumstances does not apply. Ragland v. Norris P.P. Dist. 492

Statutes.

1. Where a statute provides an adequate remedy at law, equity will not entertain jurisdiction, and the statutory remedy must be exhausted before equity may be resorted to. Koperski v. Husker Dodge, Inc. 29
2. A statute is not to be read as if open to construction as a matter of course. Where the words of a statute are plain, direct, and unambiguous, no interpretation is needed to ascertain the meaning. In the absence of anything to indicate the contrary, words must be given their ordinary meaning. It is not within the province of the court to read a meaning into a statute that is not warranted by the legislative language. Neither is it within the province of a court to read anything plain, direct, and unambiguous out of a statute.
   O'Neill Production Credit Assn. v. Schnoor 105
   Ragland v. Norris P.P. Dist. 492
   City of Lincoln v. Nebraska Liquor Control Comm. 630
3. Generally speaking, a statute should be construed so that an ordinary person reading it would get from it the usual accepted meaning. Rules of interpretation are resorted to for the purpose of resolving an ambiguity, not of creating it. O'Neill Production Credit Assn. v. Schnoor 105
4. In construing a statute, the court must look to the objective to be accomplished, and the purpose to be served, and to place on it a reasonable construction which will best effect its purpose, rather than a construction which will defeat it. West Nebraska General Hospital v. Hanlon ... 173
5. The amendment of a statute under which an accused was convicted does not affect the legitimacy of his conviction or the propriety of his sentence. State v. Rust 320
6. 1975 Neb. Laws, L.B. 567, made no changes in the provisions for consolidation of consecutive sentences and the pertinent provisions of Neb. Rev. Stat. § 83-1,110(2) (Reissue 1976) pertaining to consolidation are to be applied to consecutive sentences whether imposed before or after the effective date of L.B. 567. Gochenour v. Bolin 444
7. Our holding in *Johnson & Cunningham v. Exon*, 199 Neb. 154, 256 N.W.2d 869 (1977), that approval of the Board of

Pardons was required to apply L.B. 567 retroactively pertained only to those changes in the statute which would result in discharge from custody of the prisoner at an earlier date than before the amendments made by L.B. 567. Gochenour v. Bolin 444
8. In order to comport with due process of law, a criminal statute must be reasonably clear and definite. State v. Sodders 504
9. Difficulty in determining the meaning of the language of a statute does not automatically render it unconstitutionally vague and ambiguous. State v. Sodders 504
10. A defendant has no standing to challenge as vague a portion of the language of a statute which does not apply to his conduct when an unambiguous section of the statute clearly applies to such conduct.
State v. Sodders 504
State v. Meredith 637
11. Unless the context shows otherwise, whenever the word "month" is used in a statute it means a calendar month. State v. Jones 641
12. It is a fundamental rule of construction that in construing statutes this court will, if possible, try to avoid a construction which leads to absurd, unjust, or unconscionable results. Miller v. Peterson 658
13. A sensible construction will be placed upon a statute to effectuate the object of the legislation rather than a literal meaning that would have the effect of defeating the legislative intent. In order to determine this intent the reasons for the enactment of the statute and the purposes and objects of an act, as obtained from an examination of the legislative history, may be used as guides in an attempt to give effect to the main intent of lawmakers. Miller v. Peterson 658
14. Since ground water in Nebraska is not an article of commerce, the commerce clause of the U.S. Constitution does not apply to Neb. Rev. Stat. § 46-613.01 (Reissue 1978). State ex rel. Douglas v. Sporhase 703
15. Neb. Rev. Stat. § 43-209(6) (Reissue 1978) is sufficiently definite and is not unconstitutionally vague. In re Interest of Witherspoon 755
16. One to whose conduct a statute clearly applies may not successfully challenge it for vagueness. In re Interest of Witherspoon 755

Subrogation.

A guarantor is entitled to be subrogated to the benefit of all the security and means of payment under the creditor's control, and, in the absence of assent, waiver, or estoppel,

the guarantor is generally released by an act of the creditor which deprives the guarantor of such right. Southwest Bank of Omaha v. Herting 347

Summary Judgment.

1. The moving party is not entitled to summary judgment except where there exists no genuine issue as to any material fact and where, under the facts, he is entitled to judgment as a matter of law. Bank of Valley v. Shunk 200
2. Summary judgment is an extreme remedy and should be awarded only when the issue is clear beyond all doubt. Any reasonable doubt touching the existence of a material issue of fact must be resolved against the moving party. Bank of Valley v. Shunk 200
3. Upon a motion for summary judgment the court examines the evidence not to decide any issue of fact but to discover if any real issue of fact exists. In this respect the court should take that view of the evidence most favorable to the party against whom the motion is directed, giving to that party the benefit of all favorable inferences which may reasonably be drawn from the evidence. Bank of Valley v. Shunk 200
4. In an appeal from an order granting a motion for summary judgment, a motion for new trial is necessary in order for the court on appeal to review alleged errors in evidence. Kramer v. Swanson 794
5. The primary purpose of the summary judgment statute is to pierce sham pleadings and to dispose of, without the necessity and expense and delay of trial, those cases where there is no genuine claim or defense. Reeves v. Watkins 804

Taxation.

1. The classification of land as to kind or character of use does not alone establish the actual value of the land. The classification is only one of many factors to be considered in determining the actual value. Bumgarner v. County of Valley 361
2. In an appeal to the District Court from the action of the county board of equalization fixing the value of real property for tax purposes, the court shall affirm the action taken by the board unless evidence is adduced establishing that the action of the board was unreasonable or arbitrary, or unless evidence is adduced to establish that the property of the appellant is assessed too low. Bumgarner v. County of Valley 361
3. In an appeal to the county board of equalization or to the District Court, and from the District Court to this court, the burden of proof imposed on the complaining taxpayer is

not met by showing a mere difference of opinion unless it is established by clear and convincing evidence that the valuation placed upon his property when compared with valuations placed on other similar property is grossly excessive and is the result of a systematic exercise of intentional will or failure of plain duty and not mere errors of judgment. Bumgarner v. County of Valley 361
4. A claim of disproportionate assessment is not sustained when supported only by opinion evidence that the property is assessed at a higher proportion to its actual value than some other property. Such a contention must be sustained by evidence that the valuation is arbitrary or capricious or so wholly out of line with actual values as to give rise to an inference that the assessor and county board of equalization have not properly discharged their duties. Bumgarner v. County of Valley 361
5. Relief from the overassessment of property for tax purposes is by appeal to the District Court from the order of the county board of equalization fixing the assessed value of the property, and the remedy thus given is full, adequate, and exclusive. Jones v. Valley County Board of Equalization 559
6. A collateral attack may be made upon an assessment of property for tax purposes only if the assessment or some part thereof is wholly void. Jones v. Valley County Board of Equalization 559
7. A declaratory judgment action is not an appropriate remedy to attack an assessment of real property made by the county board of equalization. Jones v. Valley County Board of Equalization 559

Teacher Contracts.

1. There are few, if any, objective criteria for evaluating teacher performance or for determining what constitutes just cause for terminating teaching contracts of tenured teachers. Each case must, therefore, be assessed on its own facts. Hollingsworth v. Board of Education 350
2. As used in Neb. Rev. Stat. § 79-1254 (Reissue 1976), the term just cause shall mean incompetency, neglect of duty, unprofessional conduct, insubordination, immorality, physical or mental incapacity, or other conduct which interferes substantially with the continued performance of duty. Hollingsworth v. Board of Education 350
3. Incompetency or neglect of duty is not measured in a vacuum nor against a standard of perfection, but, instead, must be measured against the standard required of others performing the same or similar duties. Hollingsworth v. Board of Education 350

Tenants in Common.

1. Tenants in common can deal with third parties just as fully as owners of property held individually, including the right to terminate a lease as to the cotenant's interest. Ahrens v. Dye 129
2. A nonleasing tenant in common who does not himself wish to cultivate the property may not prevent his cotenant's lessee from doing so. Ahrens v. Dye 129

Tenure.

1. Probationary teachers in Class I, II, III, and VI schools are not entitled to notice of conditions constituting just cause for termination because their contracts are not continuing and no cause need be shown to terminate them. Meyer v. Board of Education 302
2. There are few, if any, objective criteria for evaluating teacher performance or for determining what constitutes just cause for terminating teaching contracts of tenured teachers. Each case must, therefore, be assessed on its own facts. Hollingsworth v. Board of Education 350

Termination of Employment.

1. Where an employer lawfully terminates the employment of an employee, such term of employment is not extended by the receipt of severance pay benefits provided by the employer. The payment of severance pay by the employer and the acceptance of the same by the employee generally manifests a termination of the employment relationship. Feola v. Valmont Industries, Inc. 527
2. In the absence of a promise on the part of the employer that the employment should continue for a period of time that is definite or capable of determination, such employment relationship is terminable at the will of the employer as it constitutes an indefinite hiring. When the employment is not for a definite term and there are no contractual or statutory restrictions upon the right of discharge, an employer may lawfully discharge an employee whenever and for whatever cause he chooses, without incurring liability. Feola v. Valmont Industries, Inc. 527

Testimony.

A motion to strike all the testimony of a witness should be overruled unless the entire testimony of the witness is objectionable. Damme v. Nebraska P.P. Dist. 478

Time.

1. Under Neb. U.C.C. § 2-608 (Reissue 1971), the buyer may revoke his acceptance of a lot or commercial unit

where nonconformity substantially impairs its value to him if he has accepted it on the reasonable assumption that its nonconformity would be cured and it has not been seasonably cured. Revocation of acceptance must occur within a reasonable time after the buyer discovers or should have discovered the ground for it. Koperski v. Husker Dodge, Inc. 29
2. Under the Uniform Commercial Code, the questions of whether goods are substantially impaired by nonconformity or whether revocation of acceptance is given within a reasonable time are questions of fact to be determined by the jury or trier of facts. Koperski v. Husker Dodge, Inc. 29
3. The requirement of Neb. Rev. Stat. § 29-1207 (Reissue 1979) that a defendant be brought to trial within 6 months of the filing of the information refers to 6 calendar months, not 180 days. State v. Jones 641
4. Generally, the period of time within which an act is to be done in any action or proceeding shall be computed by excluding the day of the act, event, or default after which the designated period of time begins to run. State v. Jones ... 641
5. Where a reasonable controversy exists between the parties as to the payment of compensation, an injured employee is not entitled to the statutory penalties for waiting time. Savage v. Hensel Phelps Constr. Co. 676

Tort Claims Act.

1. An alleged negligent act or omission is not actionable under the state Tort Claims Act unless it was the proximate cause of an injury. Miller v. State 170
2. The statutory provisions authorizing the transfer of an action where the venue is improper are not applicable to suits under the state Tort Claims Act. Miller v. State ... 170
3. Where the governmental subdivision does not act on a claim within 2 years after the claim accrued and the claimant does not withdraw the claim within 2 years after the claim accrued, all suits permitted by the Political Subdivisions Tort Claims Act are barred and the additional 6-month period granted under particular circumstances does not apply. Ragland v. Norris P.P. Dist. 492

Trial.

1. In a trial to the court in a law action, the findings and judgment of the trial court on the facts have the same force as a jury verdict and will not be set aside if there is sufficient competent evidence to support them, and the findings of the court will not be disturbed on appeal unless clearly wrong. Koperski v. Husker Dodge, Inc. 29
2. Where an objection that a pleading does not state a cause

of action or a defense is interposed for the first time during the trial of a cause or after verdict, the pleading must be liberally construed in light of the entire record, and, if possible, sustained. Newman Grove Creamery Co. v. Deaver 178
3. Improper evidence is not made admissible merely because it is designed to meet other evidence, and this is true regardless of the propriety of the other evidence. Damme v. Nebraska P.P. Dist. 478
4. Questions not presented or passed upon by the trial court will not be considered by this court on appeal. Guynan v. Guynan 775
5. Where cases are interwoven and interdependent and the controversy involved has already been considered and determined in a prior proceeding involving one of the parties now before the court, the court has the right to examine its own records and take judicial notice of its own proceedings and judgment in the prior action. Reeves v. Watkins 804

Trusts.

1. Mere expectancies cannot be held in trust. Kully v. Goldman 760
2. No trust can be created unless there exists some property interest which may be held by the trustee for the claimant. Kully v. Goldman 760
3. In order for equity to recognize a promise to create a trust in the future when a property or property interest comes into existence, the promise must be supported by a consideration. If no consideration exists, the promise is not specifically enforceable. Kully v. Goldman 760
4. The existence of a constructive trust is to be determined by the particular facts, circumstances, and conditions of the individual case. Guynan v. Guynan 775
5. A resulting trust is a trust created by act or construction of law; in its more restricted sense, and contradistinguished from a constructive trust, it is one raised by implication of law and presumed to have been contemplated by the parties, their intention as to which is to be found in the nature of their transactions but not expressed in the instrument of conveyance. Guynan v. Guynan 775
6. It is generally held that the foundation of resulting trusts lies in the ownership and payment of purchase money by one when title is taken in the name of another. The payment of consideration is the key issue. Guynan v. Guynan 775
7. No estate or interest in land, other than leases for a term of 1 year from the making thereof, nor any trust or power

over or concerning lands, or in any manner relating thereto, shall hereafter be created, granted, assigned, surrendered, or declared, unless by operation of law, or by deed of conveyance in writing, subscribed by the party creating, granting, assigning, surrendering, or declaring the same. Neb. Rev. Stat. § 36-103 (Reissue 1978). Guynan v. Guynan .. 775

8. Neb. Rev. Stat. § 36-103 (Reissue 1978) shall not be construed to affect in any manner the power of a testator in the disposition of his real estate by a last will and testament, nor to prevent any trust from arising or being extinguished by implication or operation of law. Neb. Rev. Stat. § 36-104 (Reissue 1978). Guynan v. Guynan 775

Uniform Commercial Code.

1. The Nebraska Uniform Commercial Code does not use the term "rescission," but refers to that remedy under its statutory provisions as "revocation of acceptance." Koperski v. Husker Dodge, Inc. 29
2. Under Neb. U.C.C. § 2-608 (Reissue 1971), the buyer may revoke his acceptance of a lot or commercial unit where nonconformity substantially impairs its value to him if he has accepted it on the reasonable assumption that its nonconformity would be cured and it has not been seasonably cured. Revocation of acceptance must occur within a reasonable time after the buyer discovers or should have discovered the ground for it. Koperski v. Husker Dodge, Inc. 29
3. Under the Uniform Commercial Code, the questions of whether goods are substantially impaired by nonconformity or whether revocation of acceptance is given within a reasonable time are questions of fact to be determined by the jury or trier of facts. Koperski v. Husker Dodge, Inc. 29
4. Under Neb. U.C.C. § 1-201(10) (Reissue 1971), the term "conspicuous" is defined to mean a term or clause so written that a reasonable person against whom it is to operate ought to have noticed it. Koperski v. Husker Dodge, Inc. 29
5. Under Neb. U.C.C. § 2-316(3) (Reissue 1971), all implied warranties are excluded by expressions like "as is," "with all faults," or other language which in common understanding calls the buyer's attention to the exclusion of warranties and makes plain that there is no implied warranty. Koperski v. Husker Dodge, Inc. 29
6. Under Neb. U.C.C. § 2-719 (Reissue 1971), a warranty agreement may provide for remedies in addition to or in substitution for those provided in this article and may limit or alter the measure of damages recoverable under this article, as by limiting the buyer's remedies to return

of the goods and repayment of the price or to repair and replacement of nonconforming goods or parts. Koperski v. Husker Dodge, Inc. 29
7. Under the Uniform Commercial Code, no consideration is necessary for an instrument given as security for a debt already owed by the party giving it or by a third person. Newman Grove Creamery Co. v. Deaver 178
8. Courts are to construe and apply the Uniform Commercial Code liberally to promote its underlying purposes and policies. Genoa Nat. Bank v. Sorensen 423
9. If an otherwise unperfected lien is not filed at all the proper places at the time of filing, but through the passage of time or change in character of the property becomes a proper filing under the provisions of the Uniform Commercial Code, the lien also becomes properly perfected and has superior rights over all other liens not otherwise perfected prior to the time that the previous security lien was perfected. Genoa Nat. Bank v. Sorensen 423

Unjust Enrichment.

A person is enriched if he has received a benefit, and he is unjustly enriched if the retention of the benefit would be unjust. Unjust enrichment of a person occurs when he has and retains money or benefits which in justice and equity belong to another. Ahrens v. Dye 129

Valuation.

1. The classification of land as to kind or character of use does not alone establish the actual value of the land. The classification is only one of many factors to be considered in determining the actual value. Bumgarner v. County of Valley 361
2. In an appeal to the District Court from the action of the county board of equalization fixing the value of real property for tax purposes, the court shall affirm the action taken by the board unless evidence is adduced establishing that the action of the board was unreasonable or arbitrary, or unless evidence is adduced to establish that the property of the appellant is assessed too low. Bumgarner v. County of Valley 361
3. In an appeal to the county board of equalization or to the District Court, and from the District Court to this court, the burden of proof imposed on the complaining taxpayer is not met by showing a mere difference of opinion unless it is established by clear and convincing evidence that the valuation placed upon his property when compared with valuations placed on other similar property is grossly excessive and is the result of a systematic exercise of

intentional will or failure of plain duty and not mere errors of judgment. Bumgarner v. County of Valley 361
4. A claim of disproportionate assessment is not sustained when supported only by opinion evidence that the property is assessed at a higher proportion to its actual value than some other property. Such a contention must be sustained by evidence that the valuation is arbitrary or capricious or so wholly out of line with actual values as to give rise to an inference that the assessor and county board of equalization have not properly discharged their duties. Bumgarner v. County of Valley 361

Venue.

1. The statutory provisions authorizing the transfer of an action where the venue is improper are not applicable to suits under the state Tort Claims Act. Miller v. State 170
2. Questions of venue may be established by circumstantial evidence as well as direct evidence. State v. Ellis 379

Visitation.

1. In a paternity action where paternity has been admitted and the natural father has demonstrated a familial relationship with the child and has fulfilled parental responsibilities of support and maintenance, the fact that the child was born out of wedlock should be disregarded, and custody and visitation of minor children should be determined on the basis of the best interests of the children. In determining with which of the natural parents the children shall remain, the standards set out in Neb. Rev. Stat. § 42-364 (Reissue 1978) are to be applied. Cox v. Hendricks .. 23
2. The District Court in an action to establish paternity has jurisdiction to award reasonable visitation rights to the father in an appropriate case. Cox v. Hendricks 23

Waiver.

1. Nonobjection to trivial breaches of a restrictive covenant does not result in loss of the right to enforce the covenant. Meierhenry v. Smith 88
2. An accused may waive his right to counsel where such waiver is made intelligently and understandingly, with knowledge of the right to counsel. State v. Rogers 464
3. The defendant has the burden of proving nonwaiver and he must show by a preponderance of the evidence that he did not intelligently and understandingly waive that right. State v. Rogers 464
4. The voluntary entry of a plea of guilty to a charge of contempt waives formal defects in the information, affidavit, or accusation. State v. Wostoupal 555

Warranty.

1. Under Neb. U.C.C. § 2-316(3) (Reissue 1971), all implied warranties are excluded by expressions like "as is," "with all faults," or other language which in common understanding calls the buyer's attention to the exclusion of warranties and makes plain that there is no implied warranty. Koperski v. Husker Dodge, Inc. 29
2. Where an action is based upon defendant's express representation made to the particular plaintiff in advertising or otherwise, courts generally hold that the plaintiff need not be in privity with the defendant to recover under breach of express warranty. The only limitation is that the plaintiff must be a party whom the defendant could expect to act upon the representation. Koperski v. Husker Dodge, Inc. 29
3. Under Neb. U.C.C. § 2-719 (Reissue 1971), a warranty agreement may provide for remedies in addition to or in substitution for those provided in this article and may limit or alter the measure of damages recoverable under this article, as by limiting the buyer's remedies to return of the goods and repayment of the price or to repair and replacement of nonconforming goods or parts. Koperski v. Husker Dodge, Inc. 29
4. Language of a warranty limiting the buyer's remedies to repair and replacement of defective parts is not, on its face, unconscionable. Koperski v. Husker Dodge, Inc. 29

Warranty Deeds.

The restrictive provisions of a warranty deed from a father to his children which provided that none of the grantees could mortgage any part of said lands except to one of the other grantees and giving each grantee the option to purchase a part of the land in the event one of the grantees should desire to sell his share, it being the intention of the grantor that said property remain within the family, are satisfied by the voluntary execution of warranty deeds by all the grantees to the grandchildren of the original grantor. Thus, there is no bar to an action in partition between the two grandchildren of the original grantor. Sweet v. Fairbairn 286

Waters.

1. Nebraska's common law of ground water permits the overlying landowner to appropriate subterranean waters found under his land, but he cannot extract and appropriate them in excess of a reasonable and beneficial use upon the land which he owns, especially if such use is injurious to others who have substantial rights to the waters; and if

the natural underground supply is insufficient for all owners, each is entitled to a reasonable proportion of the whole. State ex rel. Douglas v. Sporhase 703
2. The Nebraska Constitution declares water for irrigation purposes in the State of Nebraska to be a natural want. State ex rel. Douglas v. Sporhase 703
3. Since the Nebraska common law of ground water permits use of the water only on the overlying land, legislative action is necessary to allow for transfers off the overlying land. State ex rel. Douglas v. Sporhase 703
4. The Legislature has the power to determine public policy with regard to ground water. State ex rel. Douglas v. Sporhase 703
5. Ground water may be transferred from the overlying land only with the consent of and to the extent prescribed by the public through its elected representatives. State ex rel. Douglas v. Sporhase 703
6. Free transfer and exchange of ground water in a market setting have never been permitted in this state. State ex rel. Douglas v. Sporhase 703
7. The public may limit or deny the right of private parties to freely use the water when it determines that the welfare of the state and its citizens is at stake. State ex rel. Douglas v. Sporhase 703
8. Nebraska ground water is not an article of commerce. State ex rel. Douglas v. Sporhase 703
9. Since water is the only natural resource absolutely essential to human survival, the application of rules designed to facilitate commerce in less essential resources to the transfer of water must be done, if at all, with extreme caution. State ex rel. Douglas v. Sporhase 703
10. Since ground water in Nebraska is not an article of commerce, the commerce clause of the U.S. Constitution does not apply to Neb. Rev. Stat. § 46-613.01 (Reissue 1978). State ex rel. Douglas v. Sporhase 703
11. Neb. Rev. Stat. § 46-613.01 (Reissue 1978) does not deprive affected persons of liberty or property without due process of law. State ex rel. Douglas v. Sporhase 703
12. The reciprocity provision of Neb. Rev. Stat. § 46-613.01 (Reissue 1978) merely states one of several conditions which must be satisfied before a permit to transfer ground water out of state may issue. State ex rel. Douglas v. Sporhase 703
13. Neb. Rev. Stat. § 46-613.01 (Reissue 1978) sets up a reasonable classification of persons which is reasonably related to a legitimate state interest in preserving, for the beneficial use of its citizens, Nebraska's underground water supply, and it operates equally on all members of the affected class. State ex rel. Douglas v. Sporhase 703

Wills.

1. The provisions and conditions of a will are to be construed by the courts with a view to carrying out the intention of the testator, and the cardinal rule in construing a will is to ascertain and effectuate that intention. Olson v. Sampson 18
2. The intention of the testator is to be determined from the language of all the pertinent provisions of the will and, where applicable, the circumstances under which the will was made. Olson v. Sampson 18
3. In searching for the intention of the testator, the court must examine the entire will, consider each of its provisions, give words their generally accepted literal and grammatical meaning, and indulge the presumption that the testator understood the meaning of the words used. Olson v. Sampson 18
4. The intention of the testator must be found within the will, and that intention is the one the testator expressed by the language of the will and not an entertained but unexpressed intention. Olson v. Sampson 18
5. It is a natural presumption that a testator making his will intended to dispose of his whole estate and not to die intestate as to any part of it, and in construing doubtful expressions this presumption has weight, but it cannot supply the actual intent of the testator to be derived from the language of the will. Allemand v. Weaver 618
6. It is not the province of the courts by construction to supply omissions or to write residuary clauses for testators who neglect to do so. Allemand v. Weaver 618
7. The object and purpose of the court is to carry out and enforce the true intention of the testator as shown by the will itself, in the light of attendant circumstances under which it was made. Allemand v. Weaver 618
8. Ordinarily, a class gift is a gift to two or more persons who are not named and who have one or more characteristics in common by which they are indicated or who answer to a general description. Allemand v. Weaver 618
9. If the gift is made to beneficiaries by name, the gift is, prima facie, not one to a class, even if the individuals who are named possess some quality or characteristic in common. This is particularly true if the beneficiaries are not described as having some quality or attribute in common. Allemand v. Weaver 618
10. Where the language of a will is not conclusive but rather ambiguous, the court must determine the intent of the testator to the extent possible from the terms of the will itself. Allemand v. Weaver 618
11. Neb. Rev. Stat. § 36-103 (Reissue 1978) shall not be construed

to affect in any manner the power of a testator in the disposition of his real estate by a last will and testament, nor to prevent any trust from arising or being extinguished by implication or operation of law. Neb. Rev. Stat. § 36-104 (Reissue 1978). Guynan v. Guynan 775

Wiretaps.

1. Neb. Rev. Stat. § 86-705 (Reissue 1976) requires that each application for a wiretap shall be made in writing upon oath or affirmation to a judge of the District Court, and shall include a full and complete statement of the facts and circumstances relied upon to justify the applicant's belief that an order should be issued. The application shall give a full and complete statement as to whether or not other investigative procedures have been tried and failed or why they reasonably appear to be unlikely to succeed. State v. Holmes and Beardslee 114
2. Upon such application the judge may enter an ex parte order, as requested or as modified, authorizing or approving interception of wire or oral communications within the territorial jurisdiction of the court in which the judge is sitting, if the judge determines on the basis of the facts submitted by the applicant that: (a) There is probable cause for belief that an individual is committing, has committed, or is about to commit a particular offense enumerated in Neb. Rev. Stat. § 86-703 (Reissue 1976); (b) There is probable cause for belief that particular communications concerning that offense will be obtained through such interception; (c) Normal investigative procedures have been tried and have failed or reasonably appear to be unlikely to succeed if tried or to be too dangerous; and (d) There is probable cause for belief that the facilities from which, or the place where, the wire or oral communications are to be intercepted are being used, or are about to be used, in connection with the commission of such offense, or are leased to, listed in the name of, or commonly used by such person. Neb. Rev. Stat. § 86-705(3) (Reissue 1976). State v. Holmes and Beardslee 114
3. Neb. Rev. Stat. § 86-705(1)(c) (Reissue 1976) does not require the exhaustion of all possible or reasonable avenues of investigation. The statutory requirements are stated in the alternative, i.e., that other methods must have been tried and failed "or" that other procedures are unlikely to succeed or are too dangerous. State v. Holmes and Beardslee 114

Witnesses.

1. Where a defendant in a civil case refuses to testify on the

ground that the evidence may incriminate him, the trier of fact may draw an adverse inference from his refusal. State ex rel. Schuler v. Dunbar 69
2. The function of the lay witness is to describe what he has observed and the trier of fact will draw the conclusion from the facts observed and reproduced by the witness. Belitz v. Suhr 280
3. It is not error for a trial court to limit cross-examination of a witness concerning a subject wherein the witness has claimed the privilege against self-incrimination. State v. Ellis 379
4. A motion to strike all the testimony of a witness should be overruled unless the entire testimony of the witness is objectionable. Damme v. Nebraska P.P. Dist. 478
5. Just as an accused has the right to confront the prosecution's witnesses for the purpose of challenging their testimony, he has the right to present his own witnesses to establish a defense. This right is a fundamental element of due process of law. State v. Ammons 797
6. The constitutional right of a defendant to call witnesses in his defense mandates that they must be called without intimidation. State v. Ammons 797
7. A prosecutor may impeach a witness in court but he may not intimidate him in or out of court. State v. Ammons . 797
8. Except in certain crimes such as sexual assault, a conviction may rest upon the testimony of a single eyewitness. State v. Ammons 812
9. Generally, expert testimony is admissible only if it will be of assistance to the jury in its deliberations and relates to an area not within the competency of ordinary citizens. State v. Ammons 812

Words and Phrases.

1. The terms "injury" and "personal injuries" do not include disability or death due to natural causes but occurring while the employee is at work, nor an injury, disability, or death that is the result of a natural progression of any preexisting condition. Chrisman v. Greyhound Bus Lines, Inc. 6
2. The Nebraska Uniform Commercial Code does not use the term "rescission," but refers to that remedy under its statutory provisions as "revocation of acceptance." Koperski v. Husker Dodge, Inc. 29
3. Under Neb. U.C.C. § 1-201(10) (Reissue 1971), the term "conspicuous" is defined to mean a term or clause so written that a reasonable person against whom it is to operate ought to have noticed it. Koperski v. Husker Dodge, Inc. 29
4. In general, the word "crops" means all products of the

soil that are grown and raised annually and gathered in a single season. O'Neill Production Credit Assn. v. Schnoor . 105
5. Within the meaning of a payment bond which imposed the duty to pay for labor and materials "used or reasonably required for use in the performance of the contract," the phrase "reasonably required for use" was no more than a clause protecting the surety from excessive and unreasonable claims. Dukane Corp. v. Sides Constr. Co. 227
6. The term "independent contractor" includes building contractors erecting a building for a fixed sum according to specifications and not subject to the owner's control over the method of accomplishment. Sullivan v. Geo. A. Hormel and Co. 262
7. The word "void" means null; ineffectual; nugatory; having no legal force or binding effect; unable, in law, to support the purpose for which it was intended. Miller v. School Dist. No. 69 290
8. The word "voidable" means that which may be avoided, or declared void; not absolutely void, or void in itself; that which operates to accomplish the thing sought to be accomplished, until the fatal vice in the transaction has been judicially ascertained and declared. It imports a valid act which may be avoided rather than an invalid act which may be confirmed. Miller v. School Dist. No. 69 290
9. There is this difference between the two words "void" and "voidable": void in the strict sense means that an instrument or transaction is nugatory and ineffectual so that nothing can cure it; voidable exists when an imperfection or defect can be cured by the act or confirmation of him who could take advantage of it. Miller v. School Dist. No. 69 290
10. The exemption from the term "employment" in Neb. Rev. Stat. § 48-604(6)(o) (Reissue 1978) includes participation in a voluntary work-study program as long as grades and credits received are applied toward the high school degree and it is a part of an approved course of study. Seldin Development & Management Co. v. Chizek 315
11. As used in Neb. Rev. Stat. § 79-1254 (Reissue 1976), the term just cause shall mean incompetency, neglect of duty, unprofessional conduct, insubordination, immorality, physical or mental incapacity, or other conduct which interferes substantially with the continued performance of duty. Hollingsworth v. Board of Education 350
12. "Claim of ownership" as used in the law of adverse possession means nothing more than the intention of the occupant to appropriate and use the land as his own to the exclusion of all others, irrespective of any semblance or shadow of actual right or title. Weiss v. Meyer 429
13. A dangerous instrument within the meaning of Neb. Rev.

Stat. § 28-309 (Reissue 1979) is any instrumentality which, because of its nature and the manner and intention of its use, is capable of inflicting bodily injury, and need not be an instrument which is inherently dangerous and capable of inflicting injury. State v. Hatwan 450

14. The infliction of *serious* bodily injury is not a necessary element of assault in the second degree as defined by Neb. Rev. Stat. § 28-309(1)(a) (Reissue 1979). Neither is it an element of third degree assault under Neb. Rev. Stat. § 28-310 (Reissue 1979). State v. Hatwan 450
15. In the context of Neb. Rev. Stat. Ch. 29, art. 25 (Reissue 1979), the word "sentence" in § 29-2521.03 is construed to mean a sentence of death, and the provisions of that section directing the determination by the Supreme Court of the propriety of a "sentence" by comparison with previous cases are applicable only in a case where a sentence of death has been imposed. State v. Harper 568
16. Unless the context shows otherwise whenever the word "month" is used in a statute it means a calendar month. State v. Jones 641
17. A calendar month is a period terminating with the day of the succeeding month, numerically corresponding to the day of its beginning, less one. State v. Jones 641
18. "Traffic infractions" are misdemeanors for the purpose of determining the authority of nonlawyer associate judges under the provisions of Neb. Rev. Stat. § 24-519 (Reissue 1979). Miller v. Peterson 658
19. An employee who desires to retain his employment but resigns or quits because the employer has clearly indicated that if he does not his employment will be terminated has not left his employment "voluntarily," as that term is used in Neb. Rev. Stat. § 48-628(a) (Reissue 1978). School Dist. No. 20 v. Commissioner of Labor 663

Workmen's Compensation.

1. The terms "injury" and "personal injuries" do not include disability or death due to natural causes but occurring while the employee is at work, nor an injury, disability, or death that is the result of a natural progression of any preexisting condition. Chrisman v. Greyhound Bus Lines, Inc. 6
2. If there is some personal causal contribution in the form of a previously weakened or diseased heart, a heart attack would be compensable only if the employment contribution takes the form of an exertion greater than that of non-employment life. Chrisman v. Greyhound Bus Lines, Inc. 6
3. In an appeal to this court, the findings of fact made by the Workmen's Compensation Court shall have the same

force and effect as a jury verdict in a civil case.
Chrisman v. Greyhound Bus Lines, Inc. 6
Aguallo v. Western Potato, Inc. 66
4. The burden of proof is upon the plaintiff to show by a preponderance of the evidence that the disability sustained was caused by or related to the accident and was not the result of the normal progression of plaintiff's preexisting condition. Aguallo v. Western Potato, Inc. 66
5. A Workmen's Compensation Court determination of employee status, not independent contractor, is affirmed where substantial evidence supports the conclusion and it is not clearly wrong. Employers Ins. of Wausau v. Greater Omaha Trans. Co. 276
6. Under the facts of the case, an injured cabdriver is an employee of the cab company and entitled to workmen's compensation benefits even though written arrangement is denominated a lease of the cab rather than an employment contract. Employers Ins. of Wausau v. Greater Omaha Trans. Co. 276
7. The Workmen's Compensation Court may, as a condition of awarding compensation to an injured employee, require the employee, if appropriate, to submit himself for evaluation to determine if the employee may be retrained and thereby gainfully employed in the future. Savage v. Hensel Phelps Constr. Co. 676
8. Where a reasonable controversy exists between the parties as to the payment of compensation, an injured employee is not entitled to the statutory penalties for waiting time. Savage v. Hensel Phelps Constr. Co. 676
9. The right to tax attorney fees is purely statutory in a workmen's compensation case. Savage v. Hensel Phelps Constr. Co. 676

Zoning.

1. Enactment of the Environmental Protection Act does not divest district courts of subject matter jurisdiction to enjoin proposed solid waste disposal areas alleged to be in violation of county zoning ordinances. Omaha Fish and Wildlife Club, Inc. v. Community Refuse, Inc. 110
2. The Department of Environmental Control and county zoning officials are not indispensable parties in a suit against a licensee for a solid waste disposal area where the suit is to enjoin against an alleged violation of a county zoning ordinance. Omaha Fish and Wildlife Club, Inc. v. Community Refuse, Inc. 110
3. Zoning ordinances are inapplicable to governmental projects for the construction of which the agency in question has the power to condemn or appropriate lands by the

power of eminent domain. Witzel v. Village of Brainard 231
4. The general rule is that the propriety of a taking of property by eminent domain is not defeated by the fact that the purpose for which the property is taken is a use prohibited by the zoning regulations. Witzel v. Village of Brainard 231

Zoning Powers.

Zoning powers granted to villages under Neb. Rev. Stat. § 19-901 (Reissue 1977) shall be exercised only after the municipal legislative body has appointed a planning commission, received from its planning commission a recommended comprehensive development plan as defined in Neb. Rev. Stat. § 19-903 (Reissue 1977), adopted such comprehensive development plan, and received the specific recommendation of the planning commission on the adoption or amendment of zoning regulations. Village of McGrew v. Steidley 726